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In the

SUPREME COURT OF THE UNITED STATES

October Term 2003

PHONOMETRICS, INC.,

Petitioner,
v.

HYATT CORP.; HOLIDAY INNS INC.; INTER-CONTINENTAL HOTELS CORP.; BEST WESTERN INTERNATIONAL, INC.; TRIMARK HOTEL CORP.; RHI HOTELS, INC.; CENDANT CORP.; BENCHMARK HOSPITALITY, INC.; GROSVENOR HOTELS GROUP; FAIRMONT HOTEL MANAGEMENT CO.; and INTERSTATE HOTELS, LLC,

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court exercise its supervisory responsibility over the Federal Circuit in insisting upon consideration of the Seventh Amendment to the Constitution?

2. Is there a genuine issue of material fact regarding the patent infringed by Respondents?

3. Can the Court of Appeals decide that a call cost register that is at the calling telephone does not infringe the patent, as a matter of fact?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Phonometrics, Inc., is a Florida corporation. There are no parent corporations. No publicly held company owns 10% of Phonometrics, Inc.

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In Support of Joint Motion
For Summary Judgment

PETITION FOR A WRIT OF CERTIORARI

Phonometrics, Inc, prays for a writ of certiorari to the Federal Circuit in this patent case.

OPINION BELOW

The decision of the Federal Circuit is attached as Appendix B. The judgment was issued on September 11, 2003 affirming per curiam without opinion the order by the district court. The order by the district court granting summary judgment to Respondent is Appendix A.

JURISDICTION

This is a patent case brought in the district court under 28 U.S.C. §1338(a). Federal Circuit jurisdiction was under 28 U.S.C. §1295(a)(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution. The Seventh Amendment to the Constitution states: "In suits at common law . . . the right of trial by jury shall be preserved."

STATEMENT OF THE CASE

The caption in this Petition differs from the captions in the Federal Circuit and in the District Court because many of the Defendants who filed the Joint Motion for Summary Judgment have settled and are not now Respondents.

This Petition is related to two other Petitions involving the same patent and hotel Defendants in the Federal Circuit: *Phonometrics, Inc. et al. v. Interstate Hotels* (02-1505) regarding Rule 11 and *Phonometrics et al. v. Westin* (02-1501) regarding 28 U.S.C. § 1927, both in preparation.

This is a patent case that turns on the issue of whether the term "to the caller" is a claim term, as a matter of fact. The patent claim at issue uses the term "calling telephone" to refer to the apparatus that the invention relates to. The invention is an apparatus to make a record of call cost for calls made during a hotel stay. Defendants are hotel chains that all have devices that provide hotel guests with a folio showing the number called for each call made by the guest from the room telephone, the cost, the date and time of the call, etc. It is a nearly universal practice for hotels to provide such records, even including calls made locally or to "800" numbers that ordinarily do not have a toll. A toll is charged to the guest by each one of the hotels for local or "800" calls.

The district court held that the claim requires that the apparatus for making the call cost record be in the guest room for each one of the hotel guests, rather than a single apparatus for the entire hotel at the "calling telephone" or switchboard. It reached this conclusion because the patent specification, not the claim, describes a residential embodiment of the invention in which a display of mounting cost of long distance calls is shown on a display, like a taxi meter or gasoline pump. The district court quoted from the specification, not the claim, in stating the goal was "to continuously remind the caller as to the cost of the call" (Appendix A; A-3). This residential embodiment is if no value commercially, because the businessperson making calls from the hotel room wants to allocate the cost of each call to the appropriate business account. The patent states

that "recording of long-distance telephone call costs is of especial importance to certain business offices for the purpose of facilitating expense allocating procedures" (Appendix C, column 1, lines 10-13; A-13). Personal calls cannot be so allocated, so it is unimportant to have a record of the cost of personal calls. The claim of the patent at issue does not recite the residential embodiment where the user can see the cost rise during a call on the calling telephone being used.

In the hotel embodiment, the attendant at the calling telephone, not the hotel guest, can view the mounting cost of a single call on the hotel computer monitor, but there is no reason to do so. The attendant has no reason to limit the duration of any particular call, so there is no need to watch cost increase during a call. On the contrary, because the telephone system is a profit center for hotels, there is every reason to encourage the use of the hotel telephone system in order to improve profits. There is always a mark-up of the cost to the guest for a telephone call above the long-distance carrier cost.

The patent claim (Appendix D) uses the claim term "calling telephone" five times. It never uses the term "caller" or "user" referring to a hotel guest. The difference is between a piece of apparatus, the calling telephone, and the guest in a hotel guest room, a person. It is a question of fact whether the apparatus is related to a calling telephone or to a person. The district court found, as a matter of fact, that "the invention permits a caller to set and store the long-distance charges applicable to a particular call and to visually monitor those costs in increasing dollars and cents" (Appendix A; A-3). This changes the claim from a "machine" or tangible apparatus under 35 U.S.C. Section 101 into a "process" or use of a machine, as defined in section 100(b). The truth is that the claim defines a "computer apparatus," not a program

for a "caller" to implement. It is the "apparatus" that has the means to calculate the "cost of each long-distance call initiated from a given calling telephone" (Appendix D), and not anything done by the caller. The district court simply was mistaken, as a matter of fact, in believing that the claim required the caller to manipulate the apparatus. The caller does not "set and store long distance charges." The caller does not "visually monitor" the costs as they increase on a computer monitor because the computer monitor is at the "calling telephone," not in the guest room. All that the hotel guest can "visually monitor" is the cost of a local call shown on a card in the room as a flat rate. The claim does not call for anyone to "visually monitor" anything. That is a process step, not a machine. The district court did not get the facts straight. However, it is not for the district court to determine facts regarding infringement; it is for the jury to do so.

The court of appeals elevated the mistake of fact, substituting "caller" for "calling telephone" in the claim, to an error of law. It said that the display had to be to the caller as a matter of claim construction. Under Federal Circuit law, any fact related to claim construction may be reviewed *de novo* as a matter of law.

Background

The patent issued in 1973, when AT&T was a monopoly that controlled all long distance telephone calls in the United States. AT&T charged an initial toll for the first three minutes of a call, then a lesser charge for each increment thereafter. The patent was entitled "ELECTRONIC LONG-DISTANCE TELEPHONE CALL COMPUTER AND RECORDER" (Appendix C; A-13). The need for an apparatus to prepare a record of call cost was required because in 1973, the only way to learn the cost of a long-distance call was to ask the AT&T operator, in advance,

to provide a record of "time and charges" by calculating cost at the end of each call. The patented apparatus used the same tables for calculating the rate for long distance calls depending on the distance and calculated the cost automatically for the duration of the call, without the need for operator assistance at added cost. The invention was revolutionary and was installed in nearly every hotel in the land.

Over the years of the life of the patent, Petitioner, its owner, sued over 100 entities for infringement of the patent. Many cases settled, but most did not. No case ever went to trial, because in every case, summary judgment was granted against Phonometrics on the issue of infringement. No case ever proved that the patent was invalid; only that the patent was not infringed. For over two centuries, the ultimate issue of infringement has been "a question of fact, to be submitted to a jury" (*Winans v. Denmead*, 15 How. 330, 338 (1854); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). The fact question was never submitted to a jury in any one of the cases. The Seventh Amendment has been ignored over and over again by the district court and the Federal Circuit.

The first case to reach the Federal Circuit was *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384 (Fed. Cir. 1992). In that case, the accused device was a pay phone, where the user did indeed face the calling telephone in the same room or booth. The district court held that the patented apparatus was required to show the caller the cost of the long distance telephone call. The Federal Circuit corrected that misunderstanding by the district court by pointing out that "to the caller" was not in the claim. The error was harmless, however, because the accused device did not show call cost, as the claim requires, but rather showed remaining time available for the deposited coins by the user. In short, the

pay phone showed decrementing time or cost, not accumulating cost, and therefore did not infringe. The case was not remanded to the district court for trial because the error of the district court was harmless and no jury could find infringement in a pay phone that showed the decreasing value of the deposited coins with the passage of time.

The second case in the Federal Circuit to consider the claim was *Phonometrics, Inc. v. Northern Telecom, Inc.*, 133 Fed. 3d 1459 (Fed. Cir. 1998). The panel there said that it was not bound by the panel decision in *Intellicall* because the observation in the prior case that the claim did not include the words "to the caller" was not a statement of fact; but was "mere dictum," not binding on the later panel. The *Northern Telecom* panel held, as a matter of claim construction, that the display of the claim had to be "to the caller," directly contradicting the earlier observation in *Intellicall* of what the claim recites, as a matter of fact. In a later opinion of the Federal Circuit regarding sanctions against counsel for Phonometrics, the court said that footnote 1 of *Intellicall* was not a holding, but merely dictum, not binding on later panels.

In *Northern Telecom*, the Federal Circuit came up with an entirely different claim construction than that advanced by the district court either of the parties. It found that the last three clauses of claim 1 caused it to construe the claim as requiring a display to "the caller" (133 F.3d at 1465). In other words, the apparatus had to be in the same room as the user, and not in the location of the central "calling telephone." Ordinarily, where the appellate court comes up with a different interpretation of terms in a document from that made below, the case is remanded to the district court for the factual determination of the construed document. In a patent case, the claim can be interpreted as a matter of law, but the ultimate issue of infringement is for

the jury to determine, not the appellate court. The Federal Circuit did not remand the *Northern Telecom* case for a determination of whether the construed claim was infringed. Instead, it simply decided the ultimate decision on infringement without any consideration by the district court, either with or without a jury.

Since *Northern Telecom* was decided in 1998, the district court has always granted summary judgment of non-infringement on the ground that the defendants did not have a display "to the caller," as a matter of fact. No jury has ever been asked to decide whether the accused systems have a display to the caller; the district court has always decided the fact on summary judgment. The Federal Circuit has affirmed each one of these findings of fact, usually without opinion, as in this case.

Facts of This Case

Phonometrics proved that the defendants each have a telephone system having a combination of a Property Management Computer, a PABX and a call accounting device (Appendix E, Declaration of Sutton; A-36 and A-38.) The computer does the calculation of call cost-it is the "brain" of the apparatus. It has a monitor that can display its calculations or any other information stored in the brain. A PABX is a Private Automatic Branch Exchange that differs from the traditional Private Branch Exchange, used for generations in businesses like hotels, in that it automatically calculates information by means of a computer rather than simply store information for later retrieval. The automatic calculations are possible because the PABX, unlike the PBX, can be programmed to transmit the time of day that a call is made to the computer (Appendix E, Declaration of Qamar; A-27-28; A-31; A-33-34.) This enables the computer to make calculations at any time, not just after a call has ended

and the PBX sends a report on the message. A call accounting device has the tables for determining the cost for the distance between the calling telephone and the called party. The inputs from the PABX and the call accounting device provide all the data needed for the computer to calculate the cost of a call, whether local or long distance. A printer fed by the computer prints up the guest folio with the details on each call.

No defendant denied having this equipment. Nor did any defendant deny having a card or display in the guest room that accurately indicated in dollars and cents the cost of each local or "800" number called by the guest. There were affidavits in support of the joint motion for summary judgment from Holiday Inns, Best Western, Inter-continental Hotels, Trimark, Cendant, Benchmark, Grosvenor, Four Seasons, Fairmont, RHI Hotels, Interstate or Forte Hotels, all of the Defendants in these consolidated cases (Appendix F). The affidavits, under Fed. R. Civ. P. 56(e), were required to show that affiants are competent to testify as to the facts of the hotel call cost equipment. The affidavits did not show, under Rule 56(c), that there is no genuine issue as to whether the hotels have a combination of Property Management Computer, PABX and call accounting device, much less denying having the combination. Not one of the affidavits even mentioned the fact of the accused telephone equipment. The combination of these elements infringes the claim as construed by the Federal Circuit in *Northern Telecom* and later cases. It is a genuine issue of material fact whether defendants infringe *Markman, supra*. However, the district judge never allowed a trier of fact to consider this evidence of infringement. Instead, he decided, as a matter of fact, that the "hotels do not use telephone equipment that provides the hotel guests with a running, real-time digital display of the costs of their calls in dollars and cents" (Appendix A; A-5) "[T]heir hotels' telephone systems do not provide callers with

a real-time visual display in which the callers can track the cost of a call in dollars and cents while the call is in progress" (A-7 – A-8.) In other words, because the apparatus is at the calling telephone and was not in the guest room, there could be no infringement. The district court ignored the fact that hotels do have displays in the guest rooms showing the cost of using the access line for local or "800" calls. It is for the jury to decide whether that display satisfies the requirement for a display that allows callers "to track the cost of a call in dollars and cents" (A-7 – A-8). It is not for the district court to decide if the construed claim is infringed. Another fact that was ignored by the district court is that the switchboard operator makes calls from the calling telephone, and has a computer monitor to show the cost of the call in progress. At the very least, calls made from the calling telephone should be within the claim, no matter how it is construed.

The Federal Circuit has affirmed each one of these holdings by the district court. In each of numerous appeals, including in this case, the Federal Circuit never said a word about whether the combination of Property Management Computer, PABX and call accounting device would infringe the construed claim. Nor has the Federal Circuit ever decided that there is no issue of fact whether the combination infringes the claim. The Federal Circuit is unable to distinguish between fact and law.

REASON FOR GRANTING THE WRIT

There is a crisis in the Federal Circuit because the court insists on deciding fact issues in violation of the Seventh Amendment to the Constitution. Here, there is a genuine issue of material fact whether Respondents infringe the claim of the patent. The district court refused to consider whether the evidence of infringement presented an issue of

fact and granted the joint motion for summary judgment based on Respondent's affidavits that failed to show there was no issue of fact.

The district court and Federal Circuit held that the apparatus claimed has to display information to "the caller," a hotel guest, rather than the "calling telephone" of the hotel. No trier of fact was permitted to decide whether Respondents infringed Claim 1.

The Federal Circuit routinely decides fact issues. Supervision to require compliance with the Seventh Amendment is needed.

ARGUMENT

THE CRISIS IN THE FEDERAL CIRCUIT

Prior to 1982, every appeal of a patent infringement case went to a regional Circuit Court of Appeals. Each one of the judges in those courts was a generalist, not necessarily before appointment to the bench, but while on the bench by reason of the general jurisdiction over both civil and criminal matters. A generalist learns quickly, if not known previously, that the Seventh Amendment has profound implications in criminal cases. Guilt or innocence cannot be decided on summary judgment, and must be submitted to a jury. The difference between fact and law is starkly drawn in criminal matters; much more than in civil matters.

In contrast, no judge of the Federal Circuit, or even the two predecessor courts from which it was formed, the Court of Customs and Patent Appeals (CCPA) and the Court of Claims, has ever had a district court judge elevated to it. See, G.S. Rich, *A Brief History of the United States Court of Customs and Patent Appeals* (1980). In fact, the last CCPA

judge to have any criminal law experience in a district court was Judge Joseph R. Jackson, who sat on the district court for the District of Columbia after he retired at the CCPA (*id.* at page 102). It was Judge Jackson who tried the case of *United States v. Lurk*, that led this Court to conclude that the CCPA, which had been called the Court of Customs Appeals in 1929 and was regarded as an Article 1 court in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), was and now is an Article 3 court. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

Moreover, it seems clear that no judge of the Federal Circuit has ever tried a patent case to a jury, either as a private lawyer or as a judge. One does not have to be a district court judge or a criminal law specialist to understand the meaning of the Seventh Amendment. But it is helpful to have had the experience of jury trials to understand that patent infringement is a question of fact, to be submitted to a jury.

The point is that with no jury experience to guide in carefully accommodating the mandate of the Seventh Amendment, it is understandable that appellate judges would blur the line between fact and law. Of course, this Court cannot control the experience of circuit judges in distinguishing between fact and law. It can, however, enforce the mandate of the Seventh Amendment that in suits at common law, the right of jury trial shall be preserved. Here, it is a fact issue whether the apparatus is to be associated with the hotel's "calling telephone," a PABX, or must it be in a guest room so that a guest "can track the cost of a call."

The Federal Circuit has consistently ignored the distinction between fact and law. Shortly after the Federal Circuit was created in 1982, it reversed a decision by a district court judge, sitting without a jury, that held that the

patents in suit were obvious under 35 U.S.C. Section 103. The Federal Circuit said that the district court's consideration of prior art references was wrong. The "references, when properly evaluated, were, individually and collectively, totally inadequate" *Panduit Corp. v. Dennison Mfg. Co.* 774 F. 2d 1082 (Fed. Cir. 1985). What the prior art shows, and its significance, is one of the "basic factual inquiries" in the determination of the ultimate legal question of obviousness *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

Fact findings in a judge trial are governed by Fed. R. Civ. P. 52(a). The failure of the Federal Circuit to even mention Rule 52(a) in reversing the district court led this Court to vacate the Federal Circuit decision "and remand the case for further consideration in light of Rule 52(a)." *Panduit Corp. v. Dennison Mfg. Co.*, 475 U.S. 809 (1986).

A similar result would be appropriate here. The Federal Circuit decision should be vacated and the case remanded to the district court for a determination of facts under the Seventh Amendment. The Federal Circuit judges from the CCPA had never had reason to consider Rule 52(a) because they had never had appeals from district courts before 1982. Appeals from the Patent and Trademark Office never involved findings of fact by fact finders who heard the testimony of live witnesses and observed demeanor during cross-examination. Instead, the CCPA experience involved no live witnesses and just cold, dry documents.

For example, in *In re Zeidler*, 682 F.2d 961 (CCPA 1982), decided just before the Federal Circuit began, involved a declaration by an employee of the applicant's company that swore that his perception of color differed from that of the patent examiner. The Board of Appeals affirmed, but the CCPA reversed, stating that "an expert's evaluation in this field is entitled to more weight than that of

a layman" (assuming a patent examiner is a layman). The contrast between the sterile record in appeals from the Patent and Trademark Office and the vibrancy of a trial with live witnesses caused this commentator to "predict that in time the CAFC will be more deferential to findings of fact by lower tribunals" because of Rule 52(a) (Sutton, *Patent Trials After CAFC*, 10 APLA Q.J. 309, 318 (1982)). The prediction was proved wrong within three years, as shown by *Panduit*.

The fact issue of infringement is not subject to *res judicata* because each case must be decided on the facts presented. In the *Northern Telecom* case, there was no PABX that automatically sent to the computer the time of day when the call commenced. In these cases involving more modern technology, PABX's are used by hotels to allow the computer monitor to display cost to the attendant at the calling telephone during the call. *Res judicata* does not flow from the *Northern Telecom* case because the facts are different.

It is important not to confuse the issue of validity, to which *res judicata* applies, with the issue of infringement, a fact issue. A "plea of res judicata" requires an answer to the question "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" *Blonder-Tongue, Inc. v. Univ. of Ill. Foundation*, 402 U.S. 33 (1971), quoting *Bernhard v. Bank of America N.T. & S.A.*, 19 Cal.2d 807 (1942). A PABX is not a PBX, as a matter of fact, so the *Northern Telecom* case did not decide the identical fact issue presented here. A prior holding of non-infringement does not preclude a determination of the issue of whether a different accused device infringes the patent *Young Engineers, Inc. v. Int'l Trade Comm'n*, 721 F.2d 1305 (Fed. Cir. 1983); *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320 (Fed. Cir. 1987).

The district court and the Federal Circuit cannot simply *infer* that the claim (Appendix D; A-15) requires the caller to "track the cost of a call" (A-7 – A-8) when there is no evidence to support the inferences. On summary judgment, inferences must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." There is no evidence, as a matter of fact, that the claim requires the caller to do anything. It was wrong in 1998 in *Northern Telecom* for the court to hold that the apparatus "provides the caller with real time, accurate information about the cost of the call" (133 F.2d 1465). It is an inference that the apparatus provides the caller with anything, and such an inference is improper on summary judgment. It is a genuine issue of material fact whether there is any display "to the caller." The earlier *Intellicall* case recognized that "to the caller" was not in the claim. It cannot be inferred; it cannot be made up; it is a fact that must be supported by evidence. No jury has found that the apparatus "provides the caller with real time, accurate information about the cost of the call." The patent claim merely calls for a display in the "calling telephone."

The refusal to honor the Seventh Amendment mandate that facts are to be tried to a jury has been institutionalized by the Federal Circuit sitting *en banc*. In *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998), the court said it would never give deference to a district court's findings of fact under Rule 52(a), just as it did not give deference in *Panduit*, *supra*. Both the Seventh

Amendment and *Panduit* were ignored in *Cybor*. Curiously, the Federal Circuit relied on this Court's decision in *Markman* to support its conclusion that it could decide fact issues without deference to a trier of fact:

It said that the Supreme Court *Markman* decision "fully supports our conclusion that claim construction, as a purely legal issue, is subject to *de novo* review on appeal. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (in banc)." In other words, the Federal Circuit relied on its own expression that fact findings are to be given no deference simply because this Court affirmed. Page 979 of the Federal Circuit *Markman* decision states that "in a case tried to a jury, the court has the power and obligation to construe as a matter of law the meaning of language used in the patent claim. . . . Because claim construction is a matter of law, the construction given the claims is reviewed *de novo* on appeal." Thus, if the claim language is "calling telephone," as a matter of fact, the Federal Circuit can construe it to mean "to the caller," as a matter of law. This violates the Seventh Amendment requirement that the facts are to be determined by a jury.

In 1980, before the Federal Circuit was created, the law was well established that deference to the trier of fact was required. For example, in *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1322-1323 (5th Cir. 1980): "When the questions involved are factual ones, our review of the District Court's findings must be limited to the 'clearly erroneous' standard of Rule 52(a). . . . The Supreme Court has emphasized the deference due the findings of the trial court in complex cases, such as this one 'where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience.' *Graver*

Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 610 (1950)."

"The construction of a patent is a matter of law, and appellate courts are not bound by the limitations of Rule 52(a) when examining the District Court's construction of the patent. [citations omitted] Of course, factual findings may be employed in arriving at the patent's proper construction" (*id.*, at 1324). This view is entirely consistent with this Court's holding, in 1986, in *Panduit.*

The Federal Circuit has written off all of the regional circuit patent law before 1982. Its only binding precedent is that of the CCPA and the Court of Claims (*South Corp. v. U.S.*, 690 F.2d 1368 (Fed. Cir. 1982)). Accordingly, the Fifth Circuit explanation in *Kohle* that factual findings of a district court may be employed in arriving at the patent's proper construction is ignored by the Federal Circuit.

Instead, the Federal Circuit has concluded in *Cybor* (138 F.3d at 1454, citations omitted) that "An infringement analysis involves two steps. First, the scope and meaning of the patent claims asserted, and then the properly construed claims are compared to the allegedly infringed device. Although the law is clear that the judge, not the jury, is to construe the claims, this case presents the proper role of this court in reviewing the district court's claim construction." This passage suggests that the two steps are performed by the same entity, "the judge, not the jury." In fact, *Markman* made it abundantly clear that the Seventh Amendment requires the jury to make the factual determination of infringement of the construed claim. "[W]e review claim construction *de novo* on appeal including any fact-based questions relating to claim construction. Accordingly, we today disavow any language in previous opinions of this court that holds, purports to hold, states, or suggests anything

to the contrary," such as "findings of scientific/technological fact were material to the issue of construction," "the trial court's 'trained ability to evaluate testimony in relation to the overall structure of the patent'" and "where a district court makes findings of fact as part of claim construction, we may not set them aside absent clear error" (*Cybor*, at 1456).

It is clear that the Federal Circuit has forgotten the remand of *Panduit* showing that Rule 52(a) is alive and well, as well as the reminder in *Markman* that the Seventh Amendment is alive and well. The Federal Circuit simply cannot distinguish between fact and law. If it is "relating to claim construction," it is a question of law, in the Federal Circuit view, no matter what the trier of fact has found. "Calling telephone," an apparatus, means "to the caller," a person, as a matter of law, under the Federal Circuit reasoning. The fact that "to the caller" does not appear in the claim, as the court in *Intellicall* noted, means nothing. The Federal Circuit put the words "to the caller" in the claim as a matter of fact and excused this violation of the Seventh Amendment by calling it a matter of law.

The Federal Circuit here substitutes its view of the facts for that of the trier of fact, just as it did in *Panduit*. In the present case, the district court held that the accused device had to show "the caller" cost information because the Federal Circuit said so in *Northern Telecom*. Thus, "to the caller" is written into the claim as a matter of law, even though the term is not in fact in the claim.

In *Cybor*, footnote 3 (138 F.3d at 1454), the court said that considering expert testimony was for "the court's understanding of the patent," and "is *not* crediting certain evidence over other evidence or making factual evidentiary findings" (emphasis present). The Federal Circuit said that this Court "in effect confirmed" that the evidence was

considered to determine "the true meaning if the language employed in the patent," not determining facts, because *Markman* said that "the credibility determinations among experts 'will be subsumed within the necessarily sophisticated analysis of the whole document.'" However, Rule 52(a) expressly states that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Deference must be paid to the trial court on credibility issues, because the appellate court cannot observe the witnesses. Rule 52(a) does not say that "due regard" need only be given to the trial court's judgment on credibility if, in its *de novo* review, it agrees with the judgment on credibility.

If the appellate court substitutes its view of the facts from expert testimony in the record, it is not deferring to the trial court, as *Panduit* said. *Markman* did not "confirm" that testimony may be used by the appellate court to substitute its view of credibility for that of the trial court. *Markman* did not even mention *Panduit*, much less overrule it. Rather, *Markman* drew the line "between issues of document interpretation and product identification," and the jury may decide the "latter, ultimate issue, whether the physical objects produced by the patent were identical" to the accused objects, emphasizing *Bischoff v. Wethered*, 9. Wall. 812 (1870): "*It is not the construction of the instrument, but the character of the thing invented, which is sought in questions of identity and diversity of inventions.*" (517 U.S. at 386, emphasis present). Whether Respondents have telephone systems that have displays at the "calling telephone" relates to the "character of the thing invented." Construing "calling telephone" to mean "to the caller" distorts the character of the thing invented. Claim construction should not distort the character of the thing invented.

Where fact issues are mixed with law issues in determining infringement, it is for the jury to make the determination, based on instructions from the court. *Markman* stated that "in addressing the ultimate issue of mixed fact and law, it was for the court to 'lay down to the jury the law which should govern them,'" citing *Tucker v. Spalding*, 13 Wall. 453, 455 (1872). This clear teaching is contrary to the Federal Circuit interpretation of *Markman* in its *Cybor* decision: "Nothing in the Supreme Court's opinion supports the view that the Court endorsed a silent, third option -- that claim construction may involve subsidiary or underlying questions of fact.4/" Footnote 4 in *Cybor* (138 F.3d at 1455) reads: "if this were so, surely the Supreme Court would have discussed whether subsidiary or underlying facts should be decided by the judge or jury." *Tucker v. Spalding* makes it clear that the jury decides the facts on instructions from the judge. What further explanation is needed? *Cybor* is just another example of the inability of the Federal Circuit to distinguish between fact and law. Further guidance from this Court is needed because a crisis exists in patent law.

The Federal Circuit in *Cybor* said that the sentence in *Markman* about "interjurisdictional uniformity" of a single appeals court "demonstrates that the Supreme Court endorsed this court's role in providing national uniformity to the construction of patent claim, a role that would be impeded if we were bound to give deference to a trial judge's asserted factual determinations" (138 F.3d at 1455). This claim does not mesh with the decision by this court in *Panduit* that deference is indeed owed to the trier of fact. *Markman* clearly stated that deference is owed to jury findings of fact by citing *Bischoff*, *Tucker*, and *Winans*. The Federal Circuit conclusion that affirmance means that this Court "endorsed" the idea that any fact related to claim construction can be decided by the appellate court.

Nor does *Cybor* mesh with this Court's decision in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 38-39 (1997). Petitioners there argued that if "judges rather than juries are to construe patent claims, so as to provide a uniform definition of the scope of the legally protected monopoly, it would seem at cross-purposes to say that juries may nonetheless expand the claims by resort to a broad notion of 'equivalents'". This Court responded to the argument by citing *Winans v. Denmead*, 15 How. 330, 338 (1854) to the effect that it "is a question for the jury" whether the accused device was "the same in kind, and effected by the employment of [the patentee's] mode of operation in substance. . . . Indeed, *Markman* cites with considerable favor, when discussing the role of judge and jury, the seminal *Winans* decision." Deference to the jury on fact questions like whether the accused devices here at issue are "the same in kind" is required by the Seventh Amendment.

The question of national uniformity has led the Federal Circuit to consider itself the fountainhead of patent law. Although *Warner-Jenkinson* reversed the Federal Circuit on the issue of the doctrine of equivalents, this court left refinement of the test for equivalence to "that court's sound judgment in this area of its special expertise." (520 U.S. at 40). This deference to the Federal Circuit's expertise was intended to refer to its expertise in patent law, not expertise in deciding facts. The deference to Federal Circuit expertise in refining the doctrine of equivalents was misplaced, because the Federal Circuit concluded, in its expertise, that it could abolish the doctrine altogether, without any action by Congress or approval by this Court.

The Federal Circuit's idea of "refinement" of the test of the doctrine of equivalents "in the orderly course of case-by-case determinations" (id.) was to abolish the doctrine of

equivalents for any amended claim. Being unable to distinguish fact from law, and wanting to decide every case as a matter of law, it was only logical that the Federal Circuit would seek to abolish the doctrine altogether. There would be national uniformity if no patentee in the United States would have the benefit of the doctrine, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558 (Fed. Cir. 2000). The Federal Circuit legislated its own solution to its perceived problem as though it was the fountainhead of patent law, and not just an "inferior" court that Congress has ordained and established below the "one supreme Court" in the Constitutional scheme of Article 3, Section 1.

The effort to create a nationally uniform law that no amended patent claim may have the benefit of the doctrine of equivalents was made in order to avoid the difficult task of reviewing cases by giving deference to triers of fact in reaching a just result. This Court again struck down the effort to promulgate new patent law in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002).

The recent decision in the *Festo* case on remand from this Court shows once again that the Federal Circuit insists on *deciding* the facts of the case, rather than reviewing the findings of a trier of fact for error. *Festo Corp. v. SMC*, ___ F.3d ___, 68 USPQ2d 1321 (Sept. 26, 2003). Thirteen judges sat *en banc* to consider the remand. This Court clearly stated that there is a presumption of fact as to the application of the doctrine of equivalents, and remanded the case for a determination of whether the presumption had been overcome. The Federal Circuit decided that "rebuttal of the presumption of surrender is a question of law" (68 USPQ2d at 1326). The reason given is that "prosecution history estoppel has traditionally been viewed as equitable in nature" (*id.*). That does not make the fact question one of

law. A chancellor in equity can decide fact issues subject to review on appeal under the standard of Rule 52(a). It does not make the decided fact issue one of law. The Federal Circuit went on to *decide* some of the fact issues on the theory that if it reviews the finding of the district court *de novo*, there is no need to remand the issue to the district court because the Federal Circuit will decide the matter the way it wants to anyway. The Federal Circuit is incapable of distinguishing fact from law.

The author of the Federal Circuit *Festo* decision, Circuit Judge Lourie, has publicly stated, "we hesitate to send a case back to the district court when it is plain to us what the result will be." (60 Patent Trademark and Copyright J. 147, 149 (2000). This Court did not remand the *Festo* case for the Federal Circuit to make "inappropriate prejudgment of the facts on remand" (Newman, J, dissenting, 68 USPQ2d at 1338).

An earlier effort at national uniformity by the Federal Circuit was adoption of a policy of vacating a decision on invalidity if the Federal Circuit found a patent not to be infringed. This policy was reviewed in *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83 (1993). Again, the judgment of the Federal Circuit was vacated and remanded. The Court was unanimous in holding that "mootness was an impermissible ground for failing to decide validity" (508 U.S. at 105), (Scalia concurring)). One of the reasons given for finding that the Federal Circuit had jurisdiction to consider the appeal of a declaratory judgment claim of invalidity was that "the Federal Circuit is not a court of last resort" (508 U.S. at 97). That should have ended the view that the Federal Circuit, because of its "expertise" acknowledged in *Warner-Jenkinson*, is not the fountainhead of patent law. It is just an "inferior" court, subject to review

by this Court. This Court should exercise its supervisory responsibility in this case by granting certiorari.

The Federal Circuit decides fact issues without regard to the facts. In *Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1553 (Fed. Cir. 1997), the court looked to "Webster's II New Riverside University Dictionary" for the definition of "to;" "precepts of English grammar;" and "any syntactic signs of its meaning" to determine, as a matter of fact, what the step of "crystallizing" meant in a "process for the continuous production" of granules. The jury found that the claim was infringed, based on instructions that the heating medium, rather than the granulate, had to be at a certain temperature range. The patent specification showed that the granulate was heated to the specified temperature, but the court concluded that the word "utilizing" proved that the temperature of the heating medium, rather than the temperature of the polymer, had to be in the specified range (114 F.3d at 1554). The dissent pointed out that the majority conclusion that "crystallizing the granulate . . . at a temperature of 220° C to 260 ° C refers to the temperature of the heating medium" is not supported by the facts (114 F.3d at 1561). Neither the majority nor the dissent referred to elemental laws of nature to determine the fact issue. "Crystallizing" water to make ice is accomplished in nearly every home. Crystallization takes place when the crystals are formed from the water. It is the temperature of the water that matters, not the temperature of the medium in the ice box. A jury could make that determination based on its common experience, not on what an expert testifies. To reach a contrary result based on dictionary definitions of "to" and "under," syntax or "precepts of English grammar" is to deny the common experience. The jury should have been allowed to determine the facts. Laws of nature are facts, not law. The Federal Circuit cannot distinguish fact from law.

The crisis in the Federal Circuit caused by its inability to distinguish fact from law is widely known in the patent bar, but the cause of the problem is not widely known. There is a paucity of academics versed in patent law, so the literature is similarly limited. However, one learned law review article focuses on the frequent substitution of the Federal Circuit's view of a patent for that of the district court. Professor Kimberly A. Moore of George Mason University School of Law has addressed the crisis in the Federal Circuit in *Are District Court Judges Equipped to Resolve Patent Cases?* 15 Harvard J. of Law & Technology 1 (2001). Her view is directed at the district courts, but her findings are clear regarding the crisis in the Federal Circuit, resulting in chaos, not national uniformity.

Professor Moore conducted an empirical study of Federal Circuit decisions and found that "errors in district court claim constructions require reversing or vacating judgments in 81% of these cases" (at 2). By substituting its judgment for that of the district court on claim construction and giving no deference to district court judges, the Federal Circuit finds error in one third of all claim constructions that are appealed (at 11). Because there is no way to test the claim constructions until after the conclusion of proceedings in the district court, there is no way to determine what a claim term like "calling telephone" really means until after lengthy and expensive patent litigation (at 2-3). She reviews the literature relating to whether trial judges or juries are better able to make decisions in patent cases (at 3-4) and asks whether "district court judges [are] capable of accurately resolving patent cases or are they just the lesser of two evils?" (the other "evil" being jury resolution of cases). The Seventh Amendment determined, two centuries ago, that juries decide the facts. The issue is not whether judges or juries "resolve" patent cases. It is for the jury to decide the facts and it is for the court "to lay down to the law which

should govern them." *Tucker v. Spalding, supra*, at 455. If there had ever been a former district court judge on the Federal Circuit, this truth would be known. Taking away the right to jury trial in patent cases would require a Constitutional amendment. *Markman, supra*, at 386.

At page 16, Professor Moore supports the view here expressed that "[f]or factual determinations, however, which are often based on witness credibility, the Federal Circuit is not well-situated to review these issues without deference." However, she fails to cite Rule 52(a) and *Panduit* that applied it to Federal Circuit decisions and the Seventh Amendment, both of which require deference. She acknowledges that "[o]nly legal questions decided by a judge or jury are reviewed *de novo*, and there are not many pure questions of law" (at 15).

The more important question that Professor Moore asks is: "Is it possible that it is the Federal Circuit judges' constructions that are in error and the district judges are actually correct?" (at 18). She contrasts the Federal Circuit decisions in *CVI/Beta Ventures, Inc. v. Custom Optical Frames, Inc.*, 92 F.3d 1203 (Fed. Cir. 1996) with *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146 (Fed. Cir. 1997), where the identical patent was construed in each case. The identical term "greater than 3% elasticity" was construed in both cases. In both cases, the district court gave the same construction to the term, but the Federal Circuit affirmed the first construction and reversed the second, rejecting its own earlier construction. If there were national uniformity, the same construction would apply nation-wide. But the construction in the District of Maryland was deemed to be correct, but the same construction in the Eastern District of New York was wrong, as a matter of law.

The "importance of uniformity in the treatment of a given patent [is] an independent reason to allocate all issues of construction to the court" (*Markman*, at 390-91). In the *CVI/Beta* cases, uniformity went awry. If the two cases were decided by regional courts, this Court could resolve the conflict between regional circuits under its Rule 10(a). But where there is only one circuit court with patent jurisdiction, and that court refuses to even acknowledge the decisions of regional courts that say that findings of fact in a district court may be used in claim construction (*Kohle*, *supra*), resolution should be resolved by insisting on deference to district court findings under Rule 52(a) (*Panduit*) or deference to juries under the Seventh Amendment. The Federal Circuit should not be permitted to "make words mean so many different things" (Moore, text at footnote 1).

Professor Moore concludes that "Because of the increased uncertainty attending *de novo* review of claim construction, parties are less capable of predicting their chances of winning and therefore less likely to settle" (at 28). At page 38, she states that there is "little doubt that the present system of adjudication is flawed." The correction of this flaw is to strictly comply with Rule 52(a) in deferring to findings by district courts on factual matters and comply with the Seventh Amendment for jury cases.

There is a factual content in the term "elasticity" used in the *CVI /Beta Ventures* cases, and that underlying factual content ought to be determined by a trier of fact, not arbitrarily by the Federal Circuit. It is that arbitrariness, not just in the *CVI/Beta* cases and the *Eastman Kodak* case and many others, that has led to chaos in the district courts and a crisis in the Federal Circuit. Instead of national uniformity, we have Humpty Dumpty. No one can know what a word like "glory" means until the Federal Circuit declares, years after the patent has been written and without any deference

to what a trier of fact has found it means, that it is "a nice, knock-down argument." Carroll, *Through the Looking-Glass,* ch. 6 ("When *I* use a word, . . . it means just what I choose it to mean--neither more nor less").

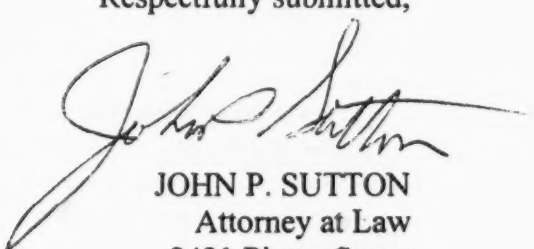
It is a fact that "to the caller" is not in the claim (A-15). The Federal Circuit ignored that fact in this case and in many others, including *Northern Telecom,* when it held that "calling telephone," a claim term, means "to the caller." It is a genuine issue of material fact whether these Defendants have an apparatus that infringes the patent. Only a jury can decide that fact question, not the district court nor the Federal Circuit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to correct the errors below.

Dated: December 8, 2003

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

PHONOMETRICS,1NC.,
a Florida Corporation,

Plaintiff,

-vs.-

MARRIOTT INTERNATIONAL, INC., and HOST MARRIOTT CORP.	Case No. 94-6533-CIV-RYSKAMP
HYATT CORP.	Case No. 94-6688-CIV-RYSKAMP
HOLIDAY INNS, INC.	Case No. 94-6689-CIV-RYSKAMP
BEST WESTERN INTERNATIONAL, INC.	Case No. 94-6690-CIV-RYSKAMP
INTER-CONTINENTAL HOTELS CORP.	Case No. 94-6691-CIV-RYSKAMP
WYNDHAM HOTEL CO.	Case No. 94-7106-CIV-RYSKAMP
HOSPITALITY INTERNATIONAL, INC.	Case No. 94-7107-CIV-RYSKAMP
TRIMARK HOTEL	Case No. 94-7110-CIV-RYSKAMP
MEDITRUST CORP., f/k/a LA QUINTA INNS, INC.	Case No. 94-7127-CIV-RYSKAMP

HOSPITALITY FRANCHISE SYSTEMS, INC. a/k/a CENDANT CORP., BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, OUTRIGGER LODGING SERVICES, and INTERSTATE HOTELS CORP.

Case No. 97-8125-CIV-RYSKAMP

Defendants.

ORDER GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendants Marriott International, Inc., Host Marriott Corp., Hyatt Corp., Holiday Inns, Inc., Best Western International, Inc., Inter-Continental Hotels Corp., Wyndham Hotel Co., Hospitality International, Inc., Trimark Hotel, Meditrust Corp., Hospitality Franchise Systems, Benchmark Hospitality, Inc., Clubhouse Inns of America, Amfac Resorts, LLC, Grosvenor Hotels Group, Four Seasons Hotels, Inc., Fairmont Hotel Management Co., Park Lane Hotels International, RHI Hotels, Inc., Inns of America, Outrigger Lodging Services, and Interstate Hotels Corp.'s ("Defendants") Joint Motion for Summary Judgment, filed March 14, 2002. Defendants' joint motion is now ripe for adjudication.

1. BACKGROUND

In 1994. Plaintiff filed complaints against each Defendant alleging patent infringement pursuant to 35 U.S.C. § 100, et seq. Plaintiffs suits stems from its now-expired patent, United States Patent Number 3,769,463 ("'463 Patent"), issued on October 30, 1973, to Philip G. Graham and Lawrence Reich and entitled "Electronic Long Distance Telephone Call Computer and Recorder." Claim 1 of the `463 patent requires, among other things, a "call cost register means, including a digital display, for providing a substantially instantaneous display of cumulative call cost in dollars and cents." Plaintiff alleges that each Defendant uses internal telephone equipment to calculate, display, and record the cost of long distance telephone calls originating within its hotels. Defendants' use of this equipment, Plaintiff claims, infringes upon the `463 Patent because it allows Defendants to, among other things, display information as to the costs of individual calls or multiple calls and store and record this data within a cumulative multi-call cost register. Because Plaintiff's patent expired on October 30, 1990, it seeks only to recover damages for the period of time prior to expiration.

As described in the Plaintiff's patent itself, the invention permits a caller to set and store the long-distance charges applicable to a particular call and to visually monitor those costs in increasing dollars and cents while the call is in progress. The invention may also be set to indicate elapsed time and to cumulatively indicate the costs of all calls made during a given period of time. (Patent-in-suit, col. I, lines 37-39). In order to provide this visual display of costs while the call is in progress, the invention includes a digital display which, according to *the* patent-in-suit, has two functions: 1) to display the cumulative cost of a single call "to continuously remind the caller as to the cost of the call as the call progresses, and 2) to indicate the total cost of the call at completion." (Patent-in-suit, col. 3, lines 27-31). The apparatus thus performs two basic functions: continuous real-time display of the present call's costs to the caller, and a report of the cumulative cost upon the call's completion.

In its opinion Phonometrics, Inc. v. Northern Telecom Inc., 133 F.3d 1459 (Fed. Cir. 1998), the Federal Circuit went

into great detail evaluating the scope of the `463 patent. Specifically, the Federal Circuit restated its previous holding from Phonometrics, Inc. v. Intellicall, 952 F.3d 1384, 1387-88 (Fed. Cir. 1992) that the patent's required "digital display" does not include machine readable devices that merely save call information on a computer for later access. Northern Telecom Inc., 133 F.3d at 1454. The Federal Circuit also held: 1) "substantially instantaneous display of cumulative call cost in dollars and cents" means "functions to display current, accurate information about the costs of a call" that is displayed for costs "as they accrue, in real time, and not only once the call has ended;" 2) the patent requires that "the costs displayed in the register must be accurate at all times during the call, so that regardless of the point at which the call is terminated, the cumulative cost displayed in the register will be accurate, without further calculation;" and 3) any real-time information provided by the equipment must be provided to "the caller." Id. at 1464-65. In sum, the Federal Circuit found that the following is required for Plaintiff to maintain a patent infringement suit with respect to the '463 Patent: "[A] devise which displays the cumulative costs of along distance call both as charges accrue and after the call has been terminated." Id. at 1466.

On March 19, 2001, this Court stayed all Phonometrics cases pending the resolution of Plaintiff's appeal of a grant of summary judgment in favor of Choice Hotels International. The Federal Circuit affirmed this Court's grant of summary judgment in favor of Choice Hotels and further emphasized the claim construction articulated in Intellicall and Northern Telecom. See Phonometrics. Inc. v. Choice Hotels Int'1. Inc., No. 01-1045, (slip op.) (Fed. Cir. October 9, 2001) (stating that "future panels like the present panel will follow the claim construction set forth by our court in the two decisions [Intellicall and Northern Telecom]"). After the Federal Circuit re-affirmed the claim construction of the '463 patent set out in Intellicall and Northern Telecom. Plaintiff indicated that he would continue to pursue this case, and on November 27, 2001, this Court released the stay of all Phonometrics cases for the sole purpose of hearing motions for summary judgment.

On March 14, 2002, Defendants filed their Joint Motion for Summary Judgment. In their motion, Defendants assert that they are each entitled to summary judgment because their hotels' telephone systems do not possess all of the required elements of the `463 patent. Defendants assert, among other things, that their hotels do not use telephone equipment that provides the hotel guests with a running, real-time digital display of the costs of their calls in dollars and cents.

Plaintiff's Response, filed March 29, 2002, contends that summary judgment may not be granted because Defendants' equipment does contain each element required in the `463 patent. Plaintiff argues that it is erroneous to require the costs to be displayed to the caller during the call. Plaintiff argues that Defendants' computers display the costs of the call to the calling telephone and that this substantially instantaneous display via a computer monitor is sufficient to withstand summary judgment.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alledged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original). An issue of fact is material if it might affect the outcome of the suit under the governing law. Id. at 248. An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The party seeking summary judgment beats the initial burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once

the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. Anderson, 477 U.S. at 256. "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); See also Matsushita Elec. Indus. Co. v. Zenith, Radio Corp., 475 U.S. 574, 587 (1986).

The Eleventh Circuit has restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

III. DISCUSSION

Although patent infringement analysis may involve questions of both law and fact, summary judgment may still be proper where there is no genuine issue of material fact. See Nike Inc. v. Wolverine World Wide. Inc., 43 F.3d 644, 646 (Fed. *Cir.* 1994). In order to prove patent infringement, the patent owner must show that "every limitation set forth in a claim must be found in an accused product or process exactly or by a substantial equivalent." Johnston v. IVAC Corp., 885 F.2d 1574, 1577 (Fed. Cir. 1989). Where the evidence concerning the structure and operation of an accused device is not refuted, summary judgment

may be properly granted. See Northern Telecom, 133 F.3d at 1464. In the instant case, for the reasons stated below, no issue of material fact exists with respect to whether Defendants used telephone equipment that infringed upon the `463 Patent, and summary judgment in favor of each Defendant is therefore proper.

The Federal Circuit has clearly stated that the `463 Patent requires that the call cost register means provide "the caller-with real time, accurate information about the costs of the call via digital display as the long distance charges accrue during the call." Id. at 1465.

Defendants have put forth evidence that the telephone systems used by Defendants' hotels do not display to the caller the costs of a telephone call, or any portion thereof, during such a call. Specifically, Defendants point to deposition testimony of Lawrence Reich, the CEO of Phonometrics, Inc., in which Mr. Reich admits that he is not aware of any hotel having telephone systems that display the cost of the call to the caller as The call is taking place. (Berg Aff. Ex. 8 at 188.) Defendants also point to Plaintiff's counsel's statement in the February 13, 1997 hearing before this Court that "the fact of the matter is that there are none of these equipments that these defendants have that has a display to the caller during the call in progress." (Berg. Aff. Ex. 11 at 8.) In addition to relying on these two statements which apply to each Defendant, each individual Defendant submitted an affidavit of its counsel, expert, or other person most knowledgeable with respect their telephone systems which support the Defendant's assertion that its telephone systems do not display the costs of the call to the caller during the call. Some individual Defendants also submitted excerpts from discovery interrogatories propounded on Plaintiff which demonstrate that the particular Defendant's telephone systems do not display the costs of the call to the caller during the call. (See generally Berg. Aff. Attachments; Affidavits filed separately.)

Plaintiff does not dispute Defendants' assertions that their hotels' telephone systems do not provide callers with a real-time

visual display in which the caller can track the cost of a call in dollars and cents while the call is in progress. Plaintiff also does not present any evidence to contradict the evidence relied on by Defendants. Instead, Plaintiff attempts to argue that it does not need to show a real time visual display to the hotel guests in order to withstand summary judgment. Plaintiff argues that the fact that Defendants' hotels' systems have computer monitors which instantaneously display the cost of the call to the calling telephone is sufficient to withstand summary judgment. Plaintiffs argument is flawed. The Federal Circuit made it quite clear in Northern Telecom that Phonometrics's patent does indeed require real-time visual displays of the running costs of calls to the callers during the call. Not only does this Court agree with the Federal Circuit's interpretation, it is bound by it, as was recently emphasized in Choice Hotels Inc.

This Court's consideration of Defendants' Motion for Summary Judgment is simple. Plaintiff has provided no evidence that Defendants' hotels' telephone systems provide callers with real-time visual digital displays depicting the cost of a call during the call, as is required under the `463 patent as defined by the Federal Circuit. Since there is no dispute of material fact with respect to whether each Defendant's telephone systems contain a required element of the `463 patent, there can be no infringement as a matter of law. Summary judgment must therefore be granted in favor of each Defendant and against Plaintiff.

IV. CONCLUSION

For these reasons stated above, and upon review of the pertinent portions of the record, it is hereby

ORDERED AND ADJUDGED that Defendants' Joint Motion for Summary Judgment, filed March 14, 2002, is **GRANTED**. Final Judgments shall be entered by separate order.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 12th day of April, 2002.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided to attached list.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-1418, -1419, -1420, -1421, -1422, -1423, -1424, -1425, -1426, -1511

PHONOMETRICS, INC.,

Plaintiff-Appellant,

v.

MARRIOTT INTERNATIONAL, INC., HOST MARRIOTT CORPORATION, MEDITRUST CORP. (formerly known as La Quinta Inns, Inc.),WYNDHAM HOTEL CO., LTD., CLUBHOUSE INNS OF AMERICA, ECONOMY INNS OF AMERICA, and AMFAC RESORTS,

Defendants,

and

HYATT CORP.,

and

HOLIDAY INNS INCORPORATED, and INTER-CONTINENTAL HOTELS CORPORATION,

and

BEST WESTERN INTERNATIONAL, INC., TRIMARK HOTEL CORPORATION, and TRIMARK HOTEL,

and

RHI HOTELS, INC.,

and

CENDANT CORPORATION (formerly known as Hospitality Franchise Systems),

and

BENCHMARK HOSPITALITY, INC.,

and

GROSVENOR HOTELS GROUP and FAIRMONT HOTEL MANAGEMENT COMPANY,

and
PARK LANE HOTELS INTERNATIONAL,
and
INTERSTATE HOTELS, LLC,
and
FOUR SEASONS HOTELS, LIMITED,
and
OUTRIGGER LODGING SERVICES,
and
FORTE HOTELS, INC.,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Florida

In CASE NO(S). 94-CV-6533, 94-CV-6688, 94-CV-6689, 94-CV-6690, 94-CV-6691, 94-CV-7106, 94-CV-7110, 94-CV-7127, 94-CV-8125, and 94-CV-7085

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED. AFFIRMED. See Fed. Cir. R. 36

Per Curiam (NEWMAN, MICHEL, and RADER. Circuit Judges).

ENTERED BY ORDER OF THE COURT

DATED: Sep 11, 2003

Jan Horbaly, Clerk

APPENDIX C

U.S. PATENT 3,769,463

1

ELECTRONIC LONG-DISTANCE TELEPHONE CALL COMPUTER AND RECORDER

This invention relates in general to a computing and recording apparatus for computing and recording the cost of long-distance telephone calls and more particularly to such a computing and recording apparatus that is solid state in construction and automatically responsive to signals generated directly from the telephone.

The indication and/or recording of long-distance telephone call costs is of especial importance to certain business offices for the purpose of facilitating expense allocating procedures, as well as some households. Heretofore it has been known to provide long-distance telephone call timers and long-distance telephone call cost indicators to satisfy this need. However, such timers and cost indicators have depended upon manual operation of the caller, such as the one disclosed in U.S. Pat. No. 3,555,193, which is subject to creating inaccuracies in the call time and the call cost as the caller may inadvertently delay or forget to operate such equipment. While it is customary for the telephone company to give time and charges for a call placed through an operator, such is not obtained when using the direct dialing procedure, which is being more widely used to reduce telephone costs. Thus, the importance of accurately indicating call costs and recording total call costs becomes more important.

The electronic long-distance telephone call cost computer and recorder of the present invention operates automatically in response to signals available and received from use of standard telephone equipment. Specifically, the apparatus of the invention is solid state in nature and responds to lifting of the receiver, answering by the called party, and replacing of the receiver to automatically cumulatively indicate the cost of the call being made, cumulatively indicate the cost of all calls made within a certain period of time, and cumulatively indicate the elapsed time of the call. The only adjustment of the apparatus to be made by the caller is to set the charge information based on long-distance rates and as presently computed on the 3-minute and per-minute in excess of three minutes basis. Once this cost data information is set, the apparatus of the invention automatically thereafter functions to indicate the call cost, the elapsed time of the call and the cumulative cost of all calls made.

* * *

APPENDIX D

United States Patent 3,769,463
Graham et al. Oct. 30, 1973

***

We claim:

1. An electronic solid state long-distance telephone call cost computer apparatus for computing and recording the cost of each long-distance telephone call initiated from a given calling telephone, actuated by the lifting and replacement of the calling telephone to operate switch means coupled to the calling telephone, and further actuated by a call-completion signal generated in the telephone system when a called party answers at a called telephone, the computer apparatus comprising:
call timing means for timing the duration of each completed call;
settable charge selector means for storing initial fixed charge data for a given predetermined initial call interval and incremental charge data for subsequent additional predetermined incremental call intervals;
call cost register means, including a digital display, for providing a substantially instantaneous display of cumulative call cost in dollars and cents;
and computer circuit means, coupled to said switch, to said timing means, to said charge selector means, and to said call cost register means, for automatically recording, in the call cost register means, the cost of each long-distance call made from the calling telephone, said computer circuit means comprising:
reset means for resetting said timing means and said

call cost register means immediately upon occurrence of said call-completion signal;
initial cost transfer means initiating operation of said call timing means and for applying the complete initial fixed charge data from said charge selector means to said call cost register means substantially instantaneously upon resetting of said call timing means and said call cost register;
incremental cost transfer means for applying the complete incremental charge data from said charge selector means to said call cost register means substantially instantaneously upon completion of timing out the initial call interval by said call timing means and for again applying the complete incremental charge data from said charge selector means to said call cost register means substantially instantaneously upon completion of timing out of each incremental call interval following said initial call interval;
and termination means for interrupting operation of said computer apparatus, with the cumulative call cost held in and displayed by said call cost register means, upon operation of said switch by replacement of the calling telephone.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

PHONOMETRICS, INC., Plaintiff,
v.

MARRIOTT INTERNATIONAL, INC., HOST MARRIOTT CORP.	Case No. 94-6533-Civ-Ryskamp
HYATT CORPORATION	Case No. 94-6688-Civ-Ryskamp
HOLIDAY INNS, INC.	Case No. 94-6689-Civ-Ryskamp
BEST WESTERN INTER-NATIONAL INC.	Case No. 94-6690-Civ-Ryskamp
INTER-CONTINENTAL HOTELS CORP.	Case No. 94-6691-Civ-Ryskamp
WYNDHAM HOTEL CO.	Case No. 94-7106-Civ-Ryskamp
HOSPITALITY INTER-NATIONAL INC.	Case No. 94-7107-Civ-Ryskamp
TRIMARK HOTEL	Case No. 94-7110-Civ-Ryskamp
LA QUINTA INNS, INC.	Case No. 94-7127-Civ-Ryskamp
HOSPITALITY FRANCHISE SYSTEMS, INC., aka CENDANT CORPORATION, BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC	Case No. 97-8125-Civ-Ryskamp

RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, OUTRIGGER LODGING SERVICES, and INTERSTATE HOTELS CORPORATION,

Defendants.

_____/

DECLARATION OF JAFFER QAMAR IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

Jaffer Qamar, under penalty of perjury, declares:

1. I am the President of SmartPad, Inc. a manufacturer of computer peripheral equipment. In particular, my company makes remote keyboards for the education industry. I founded the company in 1994 and have been its President and CEO ever since. If called as a witness in this proceeding, I could and would testify competently thereto.

2. I was trained as an engineer, receiving my first degree in Electrical Engineering and Computer Science from Northwestern University in 1979. I also received a Bachelor of Science in Applied Sciences from Northwestern. I completed all course requirements for a Master of Science degree from Northwestern, but I did not stay for the two-year residency requirement. I received a Masters in Business Administration in 1981 from the University of Chicago in one year (two year program). I enrolled in the Doctor of Philosophy in Operations Research program at Yale University in 1983 and 1984, and then transferred to the University of Chicago. From 1985 to 1993, I was in the Doctor of Philosophy in Economics program at the University of Chicago. I have completed all requirements for the Ph.D. program and am awaiting approval of my dissertation.

3. I worked as a computer programmer for NASA at the Goddard Space Flight Center in Maryland in 1979 and 1980. I programmed on the Digital Equipment Corp. PDP-8 and PDP-11 mini-computers for the Geosynchronous Satellite Relay Systems. I worked for IBM Corp. from 1982 to 1985 in Poughkeepsie and Fishkill, New York in Strategic Planning and Competitive Analysis for IBM large mainframe systems 3080 and 3090.

4. From 1988 to 1993, I was a research contractor and programmer in Chicago, Illinois, advising banks and investment and finance companies. I researched and analyzed financial data and wrote trading and hedging algorithms for stocks, bonds, options and futures portfolios.

5. I have spent over 20 years involved in the history of computer design and the capabilities of computers to perform routine tasks. I have reviewed United States Patent 3, 769,463, and I am familiar with the computers that may be used for the apparatus described and claimed in that patent.

6. I have examined the Affidavits and Declarations in support of the many motions for summary judgment filed in this case. Only one of those sworn statements identifies any specific equipment used by any defendant in this litigation. Typically, a private branch exchange ("PBX") is used to direct telephone instruments in each guest room through an extension line to trunks between the PBX and the telephone carriers for telephone calls to destinations. Call accounting equipment is used to provide for the hotel guest a record of the cost of each call made by the guest through the PBX of the hotel so that the guest may allocate the cost of each call to the appropriate account for accounting purposes.

7. I have also learned from my study of hotel call accounting systems that hotels advise the guests of the cost of local calls, calls to 800 numbers, and calls to destinations that are not regarded as long distance calls charged at long distance rates. In every instance of which I am aware, the cost is a flat rate and the guest is informed at all times before, during and after the call that the call will be charged a flat rate. The usual means of informing the guest of the costs of such calls that are not long distance calls, is a card or other display with the cost of each type of call shown in dollars and cents.

8. The affidavit of Rollins (La Quinta) admits that La Quinta hotels had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 7). He further admitted that La Quinta systems had the total cost of the call as of the end of the call after the call was terminated (paragraph 12). Finally, he admitted that La Quinta hotels had signs or placards "permanently printed in ink or the like on paper, plastic, cardboard or other ordinary printed substrate" which "indicated charges actually incurred for

telephone calls" (paragraph 16). Such displays show the hotel guest the cost of each local call in real time during the call as well as after the call has ended, by means of a display in dollars and cents.

9. The Affidavit of Boswell (Wyndham) admits that Wyndham hotels had systems "involved with accounting for the cost of calls placed using those systems (paragraph 4). He further admitted that the Wyndham systems had the total cost of the call as of the end of the call after the call was terminated (paragraph 9). Finally, he admitted that Wyndham hotels had signs or placards "permanently printed in ink or the like on paper, plastic, cardboard or other ordinary printed substrate" which "indicated charges actually incurred for telephone calls" (paragraph 13). Such displays show the hotel guest the cost of each local call in real time during the call as well as after the call has ended, by means of a display in dollars and cents.

10. The affidavit of Haynes (Intercontinental Hotels) admits that Intercontinental Hotels had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 3). If the system can account for the cost of calls, it necessarily must transfer that cost from the computer to a guest folio after the call is terminated. The Declaration of Sutton states that Intercontinental Hotels charge a flat rate for local calls and they have a display near the telephone indicating the charge for local calls. Mr. Haynes has not denied that Intercontinental hotels have a sign or placard indicating to the hotel guest the cost of each local call in dollars and cents.

11. The affidavit of Taylor (Holiday Inns) shows that he has no personal knowledge of what PBX equipment or call accounting equipment was used by Holiday Inns during the relevant period. He could not identify a single PBX or call accounting system by maker and model in any of the thousands of Holiday Inns. He made his investigation in 1996, six years after the relevant period, and only looked at "documents and business records kept by the telecommunications department at that time (paragraph 4). He failed to state whether any of the systems had

any of the elements of claim 1 of the patent. He simply states that he is aware that systems were "involved with accounting for the cost of calls placed using those systems" (paragraph 5), and that he found no evidence of elements that are not present in any claim. If the system can account for the cost of calls, it necessarily must transfer that cost from the computer to a guest folio after the call is terminated. The Declaration of Sutton states that Holiday Inns charge a flat rate for local calls and a display near the telephone advises the cost in dollars and cents during the call. Mr. Taylor does not deny the said displays were present in Holiday Inns rooms during the relevant period.

12. The Declaration of Kaleta (Hyatt) attached to the Affidavit of Berman contains no information whatsoever regarding call accounting systems used in Hyatt hotels. However, the Declaration of Sutton states that Hyatt hotels provide guests with a record of the cost of each call placed from the calling telephone, and a display of the cost of local calls is near the telephone in the guest room, showing the cost in dollars and cents during each call. There is no denial by Hyatt of this fact.

13. The Affidavit of Colclaser (Marriott) admits that Marriott hotels had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 6). He further admitted that Marriott systems had the total cost of the call as of the end of the call after the call was terminated (paragraph 11). Finally, he admitted that Marriott hotels had signs or placards "permanently printed in ink or the like on paper, plastic, cardboard or other ordinary printed substrate" which "indicated charges actually incurred for telephone calls" (paragraph 15). Such displays show the hotel guest the cost of each local call in real time during the call as well as after the call has ended, by means of a display in dollars and cents.

14. The affidavit of Cesarano (Trimark) gives no information whatsoever regarding the Trimark call accounting systems as far as the elements of the patent claim 1 are concerned. However, I am familiar with the Xeta system of call accounting from published literature. The Xeta system, when combined with

a PBX, operates in the same way as the Summa Four system described in paragraphs 30-46 below insofar as the elements of the patent claim are concerned. The Cesarano declaration does not even mention the many other Trimark hotels that infringe the patent. In the absence of any information, I assume that all Trimark hotels have PBX and call accounting equipment with the features described with respect to Summa Four and Xeta.

15. The affidavit of Cesarano (Best Western) gives no information about the PBX and call accounting systems used in the Best Western hotels. The Declaration of Sutton states that Best Western hotels charge a flat charge rate for local calls and a display near the telephone advises the cost in dollars and cents during the call. Mr. Cesarano does not deny that such displays were present in Best Western rooms during the relevant period. In the Best Western responses to interrogatories in 1995, three employees were identified by Best Western as knowledgeable regarding the equipment used, yet the affidavit in support of the motion for summary judgment is signed by a lawyer who does not claim to have personal knowledge of the equipment. However, the Best Western Rules and Regulations furnished with the moving papers show that each hotel must have in each guest room "an operating direct-dial telephone and complete dialing instructions" (§900.18). The Declaration of Sutton states that Best Western hotels have telephones that permit the guest to dial the destination number from the room and charge the cost of the call to the room. The dialing instructions in Best Western hotels include the charge for local calls.

16. The Affidavit of Rabinoff (AMFAC) admits that AMFAC hotels had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 3). He further admitted that AMFAC systems had the total cost of the call as of the end of the call after the call was terminated (paragraph 9). Finally, he admitted that AMFAC hotels had signs or placards "permanently printed in ink or the like on paper, plastic, cardboard or other ordinary printed substrate" which "indicated charges actually incurred for telephone calls" (paragraph 13). Such displays show

the hotel guest the cost of each local call in real time during the call as well as after the call has ended, by means of a display in dollars and cents.

17. The Affidavit of attorney Davis (Hospitality Franchise Systems) fails to disclose any information about the PBX or call accounting equipment used in the relevant period. The Verification of Responses by Gray attached to discovery documents also fails to show what equipment HFS used and whether the elements of the claim were present in that equipment.

18. The Affidavit of Shuham (Clubhouse Inns) fails to disclose any information about the PBX or call accounting equipment used in the relevant period. The Verification of Responses to Interrogatories by Morse attached to discovery documents also fails to show what equipment Clubhouse Inns used and whether the elements of the claim were present in that equipment. The answer to Interrogatory 2 identifies Thomas Scrivner as having knowledge, but he did not support the motion for summary judgment.

19. The Affidavit of Lathrum (Inns of America) admits that Inns of America had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 4). He further admits that Inns of America systems had the total cost of the call as of the end of the call after the call was terminated (paragraph 9). Finally, he admitted that Inns of America had signs or placards "permanently printed in ink or the like on paper, plastic, cardboard or other ordinary printed substrate" which "indicated charges actually incurred for telephone calls" (paragraph 13). Such displays show the hotel guest the cost of each local call in real time during the call as well as after the call has ended, by means of a display in dollars and cents.

20. The Affidavit of Fitts (Outrigger Lodging) admits that guests could charge local calls to the room (paragraph 5). The charge was $.50 to $1.00 added to the guest folio (paragraph 7). He further admits that the guest was informed during the call of

the cost of the call (paragraph 9). A display of $.50 to $1.00 is a display in dollars and cents.

21. The Affidavit of attorney Slavitt (Fairmont) fails to disclose any information about the PBX or call accounting equipment used in the relevant period. The Verification of Responses by Bond attached to discovery documents also fails to show what equipment Fairmont used and whether the elements of the claim were present in that equipment. The response to interrogatory 2 identifies Wade, Tackaberry, Galeano and March as knowledgeable witnesses, yet none of them supports the motion for summary judgment.

22. The Affidavit of Bond (Fairmont) shows that he is a financial person, not a technical person with knowledge of the capabilities of PBX and call accounting equipment in the Fairmont hotels. He admits that Fairmont hotels had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 5). If the system can account for the cost of calls, it necessarily must transfer that cost from the computer to a guest folio after the call is terminated. The Declaration of Sutton states that Fairmont hotels charge for local calls and display the cost of such calls to the hotel guest during the call.

23. The Affidavit of attorney Slavitt (Grosvenor) fails to disclose any information about the PBX or call accounting equipment used in the relevant period. The verification of responses by Werby attached to discovery documents also fails to show what equipment Grosvenor used and whether the elements of the claim were present in that equipment. The response to interrogatory 2 identifies Gross as a knowledgeable witness, yet he did not support the motion for summary judgment.

24. The Affidavit of Werby (Grosvenor) shows that he is a financial person, not a technical person with knowledge of the capabilities of PBX and call accounting equipment in the Grosvenor hotels. He admits that Grosvenor hotels had systems during the relevant period that were "involved with accounting for

the cost of calls placed using those systems" (paragraph 5). If the system can account for the cost of calls, it necessarily must transfer that cost from the computer to a guest folio after the call is terminated.

25. The Affidavit of McDowell (Four Seasons) admits that he personally selected the equipment to be installed in some properties operated by Four Seasons. Further, "regardless of the specific equipment used at a property, the manner in which long distance calls were handled in a property in 1990 is generally the same as those calls are handled today" (paragraph 3). He admits that the equipment involved accounting for the cost of calls placed by hotel guests (paragraph 4). The Declaration of Sutton states that Four Seasons hotels charge for local calls and charge for long distance calls to the guest's room.

26. The Affidavit of Gregovits (Interstate Hotels) gives no information about the operation of the PBX or call accounting equipment. The table attached to the unverified response to interrogatories as Exhibit A states that the make of PBX is not available. The call accounting equipment is said to be Xeta, which is similar in all respects relevant to the elements of the patent claims to the Summa Four system described in paragraphs 30-46.

27. The Affidavit of Reinhardt (Park Lane) admits that Park Lane had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 5). If the system can account for the cost of calls, it necessarily must transfer that cost from the computer to a guest folio after the call is terminated. Mr. Reinhardt has not denied that Park Lane hotels have a sign or placard indicating to the hotel guest the cost of each local call in dollars and cents.

28. The Affidavit of Ring (RHI) and the discovery response attached provide no information about PBX or call accounting equipment used. In the absence of any information provided in discovery, I assume that RHI uses equipment like

those in other hotels that have all of the elements of claim 1 of the patent.

29. The Affidavit of Thiel (Benchmark) admits that Benchmark hotels had systems during the relevant period that were "involved with accounting for the cost of calls placed using those systems" (paragraph 5). If the system can account for the cost of calls, it necessarily must transfer that cost from the computer to a guest folio after the call is terminated.

30. In the absence of any definitive description of the equipment used in each hotel in the moving papers, I have used the Summa Four installation manual for 1994 to explain how the systems work. To my knowledge, every hotel call accounting system has the same combination of elements as claimed in claim 1 of the Phonometrics patent and as shown in the Summa Four call accounting computer when combined with a PBX.

31. I identify Exhibit A-139 as the cover of the Summa Four, Inc. Installation and Maintenance Manual for the MCX-7700 series of call accounting equipment. The MCX 7700 system was a call accounting package that hotels, among other businesses, bought to take data from the hotel PBX and provide a record of call cost for hotel guests. The particular system described is similar to all call accounting systems used at the time as far as the elements of claim 1 of the patent are concerned. This Manual was attached in its entirety to my Declaration in the *Choice Hotels* case. The page numbers are from the Joint Appendix in the appeal of the *Choice* case.

32. I identify A-142 as the copyright page for the manual. It shows that the manual was prepared in 1984, before the relevant period in all of these cases. The system described was used by hotels during the relevant period.

33. I identify A-152 as a description of the telephone management system as a stored program device operating with a PABX. A PABX is an automatic PBX, which meets the "automatically" term of claim 1 of the patent at column 8, lines

55-58 and 62-64. The information provided by the telephone management system includes the source, time, duration, called number and pricing of each call. Claim 1 of the patent states that the computer circuit means is "for automatically recording" the cost of each long distance call made from the calling telephone (column 8, lines 46-49). Each of the defendants most likely has such a computer circuit means with a PBX.

34. I identify A-154 as a description of the call accounting system as a computer which controls the process of accepting data from the PABX and reformats the data, prices each call and makes reports. The patent states in claim 1 that there are seven elements to the apparatus. First is a timing means. Second is a rate selection means. Third is a register means, including a display of call cost in dollars and cents. Fourth is a computer connected to the other elements for calculating cost. Fifth is a transfer means for transferring the initial three-minute charge to the register means. Sixth is a transfer means for transferring the per-minute charge to the register means. Seventh is a termination means in the PBX. All of these elements are contained in the combination of a PBX and a call accounting system.

35. The timing means is contained in the PBX as will presently become clear. The rate selection means is in the call accounting means, using the destination number from the PBX to determine the distance from the calling telephone to the destination. The register means is the computer monitor on which the cost data is displayed. The computer is the Central Processing Unit described in A-154 as the "heart" of the system. The transfer means for transferring data from the PBX to the computer is a cable described in later pages of the manual. The PBX terminates the call when the calling party hangs up.

36. I identify A-155 as the list of peripheral equipment used with the CPU of the call accounting apparatus. It includes a key pad to enter commands to the computer, a Station Message Detail Record cable from the PBX to the computer, a printer for printing a record substantially instantaneously from the computer memory, and a cable from the key pad to the printer.

Both cables serve the function of transfer means as defined in the claim.

37. I identify A-156 as a drawing illustrating how the elements fit together. The hotel guests have extensions from the PBX in the guest rooms. The PBX can connect a user line to a trunk line provided by a telephone carrier to the hotel. The drawing shows the trunks going from the PBX to the telephone company, which then connects to destinations. The output of a PBX is an SMDR which is fed via cable transfer means to the computer, called an MCX-7700 in this installation. The computer has a touchpad or keypad for entering commands and a printer for printing call records. Ordinary electrical power is fed to the computer as shown by A-156. A-162 explains that a terminal with a video display or a touchpad may be used as desired for entering commands.

38. I identify A-171 as a drawing illustrating how the transfer means transfers data from the PBX in the form of an SMDR to the computer and then transfers cost records via the touchpad to the printer to provide the hotel guest with a record for call cost for accounting purposes.

39. I identify A-183 as a description of how SMDR codes are entered into the computer. The station message detail record is delivered to the then standard RS-232C port on the computer. The software used in telephone systems varies, so the particular software release appropriate for the particular telephone system must be encoded in the computer. One must "know the model and specific software release of the customer's PABX or key system to" prepare a call record. The data coming from the PBX is called the station message detail record (SMDR) and is fed into a suitable port on the computer, such as the RS232 port. Entry of the proper SMDR format codes must be completed for the installation to be successful in the call accounting computer.

40. I identify A-201 as a description of how per-minute special rates may be entered into the computer for

particular calls, such as over a WATS line. Flat rates, such as used for local rates are not special rates, which are per minute.

41. I identify A-192 as a description of how the pricing database for long distance telephone calls are downloaded into the computer so that the computer can select the proper long distance rate for the call. When a call is completed to a destination, the system looks up the telephone number in an index, which points the computer to the charge selection rate. This is the second element of claim 1 of the Phonometrics patent. It does not require thumbwheel switches to determine the appropriate long distance rate.

42. I identify A-246 as a description of how long distance charges are calculated. The system "goes to that rate table and looks up the rate it should use for pricing the call. A calculation of call price is immediately performed." This is "substantially instantaneously" as described in the patent.

43. I identify A-243 as a description of how a hotel can charge additional amounts to a hotel guest by means of a surcharge or a multiplier. It also describes a grace period, which is the length of time that the system waits before pricing the call.

44. I identify A-235 as a description of how to enter flat rates, such as $.50 per call, often used by hotels for local calls.

45. I identify A-217 as a description of how to request an extension activity report for a hotel guest having an extension in his room. This is the command entered when the guest checks out of the hotel and desires a printed record of all calls made from the room.

46. The Summa Four Manual has specific descriptions of how to code SMDR information from all of the PBX makers in 1984. It also has code description for PBX systems that are not specifically identified. I identify A-307 as such a code entry procedure. The 21 locations in the data stream from the PBX must be entered into the computer. All PBX

systems use ASCII characters that have 2 digit decimal values. These values are listed in A-307, and include incoming and outgoing call data, three levels of call duration, the time of day when the call begins, the beginning and end of the dialed number, the account code and the extension number for the guest. The computer uses all of this information in preparing the record of the cost of each call during the guest's stay. All of the PBX data is used for calculations substantially instantaneously. I identify A-304 as a description of the pointers for call duration in A-307.

47. The PBX can be programmed to send its data stream containing information on the commencement of the call and the destination number at the beginning of the call and at the end of the call. When the data is sent to the computer at the beginning of the call, the computer can calculate cost for any period of time that is desired. For example, if there is a charge for the first three minutes of a call, as the telephone company used to charge ("the complete initial fixed charge data" in column 8, lines 55-56), the computer can display on the computer monitor the fixed charge during the first three minutes of a call. Similarly, when the computer receives from the PBX the commencement of timing at the beginning of the call, the computer can calculate cost by multiplying rate times duration for each minute of the call and display the cumulative cost on the digitally computer monitor ("the complete incremental charge data" in column 8, lines 60-61). Adding the per-minute charge to cost data previously stored in the computer is a task that computers easily accomplish. Thus, the combination of a PBX and call accounting computer includes "initial cost transfer means" for displaying cost substantially instantaneously to the computer monitor, as well as "incremental cost transfer means" for applying incremental costs to the computer monitor. No hotel guest would want a first report stating that the first three minutes of the call cost a specified amount, a second report for the cost for four minutes, a third report for the cost of five minutes, and so on. All the hotel guest wants is the total cost so that it can be allocated to the proper account. In any event, all cost calculations are "immediately performed" (A-246), which is "substantially instantaneous." The SMDR stream is sent

at the termination of the call so that the computer can calculate the total cost of the call.

48. In my opinion, the combination of a PBX that can send the SMDR data stream at both the beginning of the call and at the end of the call to a call cost computer infringes claim 1 of the patent. A card in the guest room is a display of call cost in dollars and cents during the call.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 28, 2002, at San Francisco, California.

_____

JAFFER QAMAR

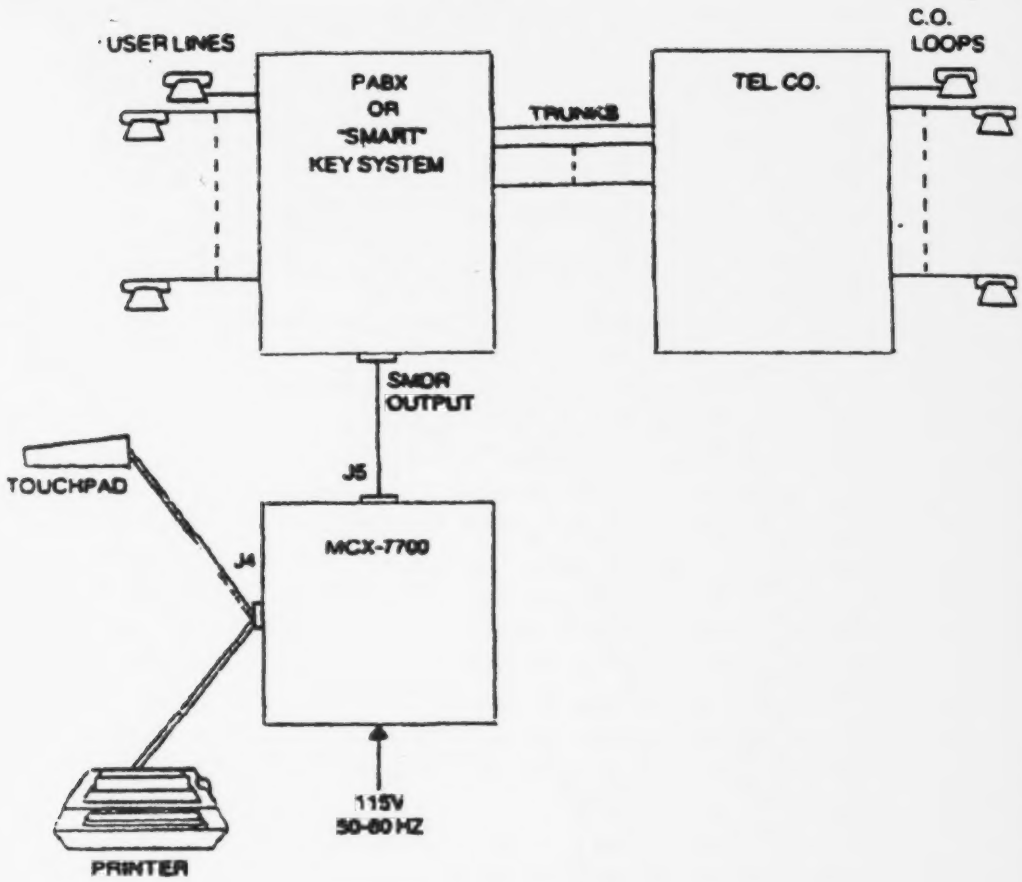


Figure 1.1 Recommended Configuration of the MCX-7700

WRITE IN CODES YOU IDENTIFY USING THIS FORM:

You Enter	Description of Command
_____	Call Record Start Character (ASCII[a])
_____	Length of Minimum Call Record
_____	Pointer: To Outgoing Call Record Test Character
_____	Value of Outgoing Call Record Test Character (ASCII[a])
_____	Value of Alternate Outgoing Call Record Test Character (ASCII[a])
_____	Pointer: To Incoming Call Record Test Character
_____	Value of Incoming Call Record Test Character (ASCII[a])
_____	Time Format Control Byte
_____	Pointer: To Call Duration, 100s/Minutes or 10s/Hours
_____	Pointer: To Call Duration, 10s/Minutes or End of Call
_____	Pointer: To Call Duration, Tenths/Minutes or 10s/Seconds
_____	Pointer: To Beginning of Start Time of Day
_____	Pointer: To Beginning of Outgoing Trunk or Access Digit
_____	Pointer: To Beginning of Incoming Trunk Digits
_____	Pointer: To Beginning of Dialed Number
_____	Pointer: To End of Dialed Number
_____	Pointer: To Beginning of Account Code
_____	Pointer: To End of Account Code
_____	Pointer: To Beginning of Outgoing Extension #
_____	Pointer: To Beginning of Incoming Extension #
_____	Length of Extension Digit Field

[a]Codes for ASCII Characters are 2-Digit Decimal Values.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

(West Palm Beach Division)

PHONOMETRICS, INC., Case No. 94-7085-CIV-RYSKAMP

Plaintiff,

v.

FORTE HOTELS, INC.

Defendant.
_____/

DECLARATION OF JOHN P. SUTTON IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

John P. Sutton, under penalty of perjury, declares:

1. I am an attorney at law duly licensed and am the attorney for plaintiff Phonometrics, Inc. in the above-captioned matter. As such, I am intimately familiar with the facts of this case and if called as a witness, I could and would testify competently thereto.

2. I attach hereto as Exhibit 1 a true and correct copy of a letter dated October 23, 1990 to Phonometrics, Inc. from J.D. Byrne, Assistant General Counsel of Mitel Corporation.

3. I attach hereto as Exhibit 2 a true and correct copy of a brochure on the SX-200 Digital Telephone System.

4. I attach hereto as Exhibit 3 a true and correct copy of a March 1988 article from Teleconnect Magazine.

5. I attach hereto as Exhibit 4 a true and correct copy of a March 1987 article from Teleconnect Magazine relating to the SX-200.

6. I attach hereto as Exhibit 5 a true and correct copy of a March 1989 article from Teleconnect Magazine.

7. I attach hereto as Exhibit 6 a true and correct copy of the Cover, the Copyright Page and Page 140 of the Summa Four Installation and Maintenance Manual.

8. I attach hereto as Exhibit 7 a true and correct copy of a December 1990 article from Phone Magazine.

9. I attach hereto as Exhibit 8 a true and correct copy of the first page and column 8 of the patent-in-suit 3,769,463 issued October 30, 1973.

10. I attach hereto as Exhibit 9 a true and correct copy of the OSS/HSS Call Controller Answer Detection for Mitel Operator Services System.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2003, at San Francisco, California.

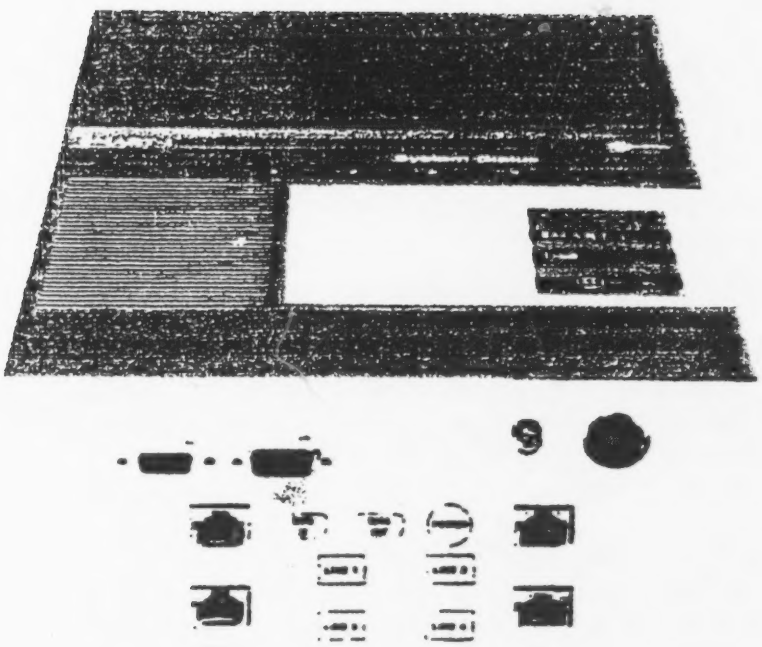
_____

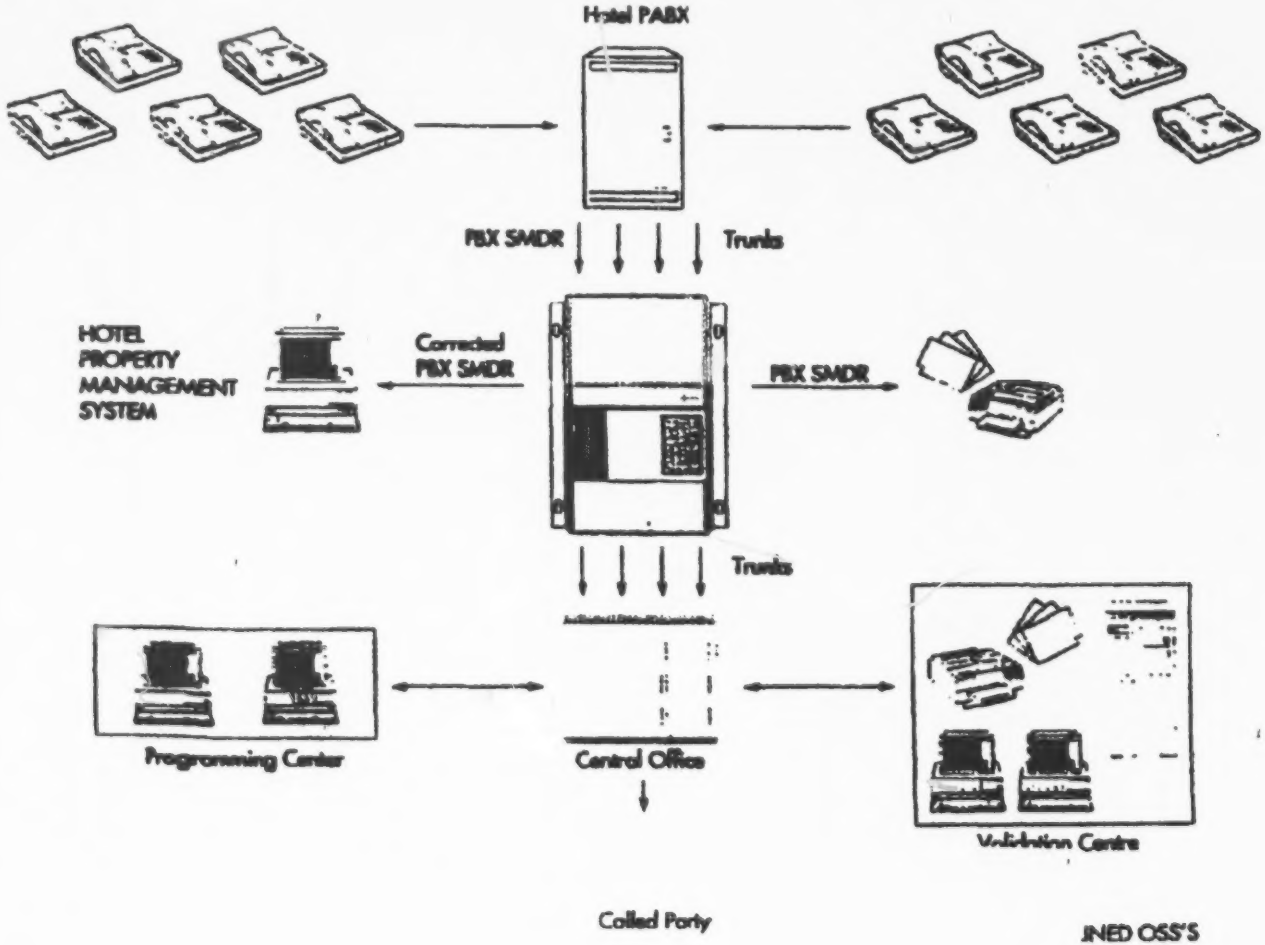
JOHN P. SUTTON

Submitted by:

JOHN P. SUTTON (CA SBN 36560)
Attorney at Law
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Plaintiff, Phonometrics, Inc.

SMART-1™
Operator Services System




Hotel PABX
PBX SMDR
Trunks
HOTEL
PROPERTY
MANAGEMENT
SYSTEM
Corrected
PBX SMDR
PBX SMDR
Trunks
Programming Center
Central Office
Called Party
JNED OSS'S

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-6688-CIV-RYSKAMP
Magistrate Judge Vitunac

PHONOMETRICS, INC.,
a Florida Corporation,

Plaintiff,

v.

HYATT CORPORATION,
a Delaware Corporation.

Defendant.
_____/

AFFIDAVIT OF JILL NEXON BERMAN IN SUPPORT OP HYATT CORPORATIONS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Before me, the undersigned authority, personally appeared Jill Nexon Barman, Esq., who first being sworn, deposes and states:

1. I am an attorney of law with the law firm of Berman Rennert Vogel & Mandler, P.A., attorneys of record for Defendant, Hyatt Corporation ("Hyatt").

2. I have personal knowledge of the matters contained herein and, if called upon, could and would competently testify to the matters, as stated below.

3. Exhibit "1" attached hereto is a true and correct copy of Hyatt's Answers to Plaintiffs First Set of Interrogatories. These answers were served on May 19, 1995. As stated therein, Hyatt did not use any proprietary call cost accounting during the relevant period.

FURTHER AFFIANT SAYETH NAUGHT.

Executed this 13th of March, 2002, at Miami, Florida.

_____
Jill Nexon Berman
Florida Bar Number 265608

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

BEFORE ME THIS DAY, personally appeared Jill Nexon Berman, Esq., who, being personally known to me, duly swore, deposed and stated that she reviewed the foregoing affidavit and affirms that the Affidavit is true and correct.

SWORN TO AND SUBSCRIBED before me this 13th day of March, 2002.

_____
NOTARY PUBLIC
State of Florida at Large

My Commission Expires:

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH
CASE NO. 94-6689-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC., a Florida corporation,

Plaintiff,

vs.

HOLIDAY INNS, INC., et al.,

Defendants.
_____/

AFFIDAVIT OF PERSON MOST KNOWLEDGEABLE FOR DEFENDANT HOLIDAY INNS, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE. SUMMARY ADJUDICATION

I, JAMES TAYLOR, declare as follows:

1. I am Director of Global Networks for Six Continents Hotels, Inc., assignee of HOLIDAY INNS, INC., ("HOLIDAY") a party in the above-entitled action. I reside in Fulton County, Georgia and am over eighteen (18) years old. I worked with the telecommunications aspect Holiday's business from 1994 until 1997 and continued in a similar role with Six Continents Hotels, Inc. My job responsibilities have included various functions at various times, including advising Holiday's hotels regarding telephone and telephone-related software and accounting systems.

2. I am making this Affidavit in support of Defendant's

Motion for Summary Judgment of Non-Infringement. If called upon to testify in this matter, I would testify based upon my personal knowledge as to the facts contained in this Affidavit.

3. I have a Bachelor of Science in Textile Engineering from Georgia Institute of Technology, 1970.

4. In November 1996, while working with Holiday, I performed an investigation of the call cost accounting systems used at properties Holiday managed or had an ownership interest in between July 26, 1988 and October 30, 1990. My investigation was based on a review of the documents and business records kept by the telecommunications department at that time.

5. I am familiar with the structure, operation, and maintenance of telephone systems of the type my investigation revealed were used by HOLIDAY between July 26, 1988 and October 30, 1990 (hereinafter the "Accused Systems") including, without limitation, those portions of the Accused Systems involved with accounting for the cost of calls placed using those systems.

6. I have not found and am aware of no evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, which was capable of displaying the costs of a call or any portion of a call, either in dollars and cents or in any other units, to any person, including, without limitation, the person placing that call, at any time while that call was in progress.

7. I have not found and am aware of no evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, from which the person placing a call, or any other person, could see or otherwise perceive the cost of that call increasing in real time, either in dollars and cents or in any other units at any time while that call was in progress.

8. I have not found and am aware of no evidence that any of the Accused Systems ever included any display, either

digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive the cost of that call or any portion of that call at any time while that call was in progress.

9. I have not found and am aware of no evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive information indicating the cost associated with that call or any portion of that call until some time after that call was no longer in progress.

FURTHER AFFIANT SAYETH NAUGHT

Executed this 8th day of March 2002.

_____
JAMES TAYLOR

STATE OF Georgia

COUNTY OF Fulton

Before me on this 8 day of March, 2002, James S. Taylor appeared as the (see above) of Holiday Inns, Inc. on behalf of Holiday Inns, Inc., who is personally known to be or produced _____ as identification.

_____
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

PHONOMETRICS, INC.,

Plaintiff,

vs.

ITT SHERATON CORP.	Case No. 94-6502-Civ-Ryskamp
HILTON HOTELS CORP.	Case No. 94-6503-Civ-Ryskamp
WESTIN HOTEL CO.	Case No. 94-6504-Civ-Ryskamp
MARRIOTT INTER-NATIONAL, INC., et al.	Case No. 94-6533-Civ-Ryskamp
HYATT CORD.	Case No. 94-6688-Civ-Ryskamp
HOLIDAY INNS, INC., et al.	Case No. 94-6689-Civ-Ryskamp
BEST WESTERN INTER-NATIONAL, INC., et al.	Case No. 94-6690-Civ-Ryskamp
INTERCONTINENTAL HOTELS CORP.	Case No. 94-6691-Civ-Ryskamp
EMBASSY SUITES, INC., et al.	Case No. 94-6649Civ-Ryskamp
FORTE HOTELS, INC., et al.	Case No. 94-7095-Civ-Ryskamp
CONCORD HOTELS, INC., et al.	Case No. 94-7087-Civ-Ryskamp
CHOICE HOTELS INTER-NATIONAL, INC.	Case No. 94-7097-Civ-Ryskamp
WYNDHAM HOTEL CO., et al.	Case No. 94-7106-Civ-Ryskamp
HOSPITALITY INTER-NATIONAL, INC., et al.	Case No. 94-7107-Civ-Ryskamp
TRIMARK HOTEL, et al.	Case No. 94-7119-Civ-Ryskamp
LA QUINTA INNS, INC., et al.	Case No. 94-7127-Civ-Ryskamp
ACCOR NORTH AMERICA CORP., et al.	Case No. 94-7129-Civ-Ryskamp

CONTINENTAL COMPANIES, INC., et al.	Case No. 94-7130-Civ-Ryskamp
HAMPTON INNS, INC., et al.	Case No. 95-6209-Civ-Ryskamp
HOSPITALITY FRANCHISE SYSTEMS, INC., et al.	Case No. 95-8125-Civ-Ryskamp

Defendants.

AFFIDAVIT OF MICHAEL C. CESARANO IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

MICHAEL C. CESARANO, being first duly sworn, gives the following Affidavit:

1. I am counsel of record for defendants TRIMARK HOTEL and BEST WESTERN INTERNATIONAL, INC. I have been counsel of record for these defendants continuously from the time the complaint was filed.

2. In my investigation of the allegations of the complaint, and my representation of these defendants, as is more fully articulated below, I have discovered no evidence whatsoever that would tend to show that either defendant has used a telephone system that infringes the patent in suit.

3. On behalf of these defendants, I have previously responded to discovery requests from the plaintiff, and am attaching hereto copies and reproductions of those responses that have been located.

4. While the discovery responses are largely incomplete, due to the fact that an investigation had not been completed at the time they were served, I subsequently received additional information from these defendants, given below, that would be included in any subsequent discovery responses.

5. On behalf of TRIMARK HOTELS, I spoke with James Gordon, of Ridgeway Communications in Memphis, Tennessee. Mr. Gordon informed me that he had been consulted regarding the telephone systems installed at the Park Plaza Inn in Hialeah, Florida, and the Park Inn International in Bradenton Florida, both of which were owned by defendant TRIMARK during the relevant time period. According to Mr. Gordon, the telephone system used by the Park Plaza Inn was a XETA system manufactured by XETA Corporation in Tulsa, Oklahoma. Mr. Gordon referred me to a Mr. Harv Howard regarding the specifications of the phone system in question. Mr. Howard informed me that XETA Corporation had also been sued by Phonometrics, and that all communications regarding Phonometrics were being handled by XETA's president, Jack Ingram. My attempts to speak with Mr. Ingram were unsuccessful, although I did speak with Robert Bartz, a lawyer in Tulsa, Oklahoma, who stated that he represented XETA Corporation, and who explained that XETA had not been made a defendant in any action brought by Phonometrics. I requested specifications from Mr. Bartz regarding the XETA telephone system at the Park Plaza Inn, but was able to gather no additional information regarding the XETA system.

6. Mr. Gordon informed me that the telephone system in use in the Park Inn International during the relevant time period was an Innform XL system manufactured by Tel-Electronics Company in Utah. Mr. Gordon suggested that I speak with David Lamb at Tel-Electronics regarding the telephone system. I telephoned Mr. Lamb, and left at least one voice mail requesting that he return my telephone call, but he did not contact me. I have no other information regarding the Inform XL telephone system.

7. On behalf of BEST WESTERN INTERNATIONAL, INC., I spoke with Joseph Roediger who, at that time, was outside counsel for BEST WESTERN. Mr. Roediger informed me that BEST WESTERN is the owner of the BEST WESTERN trademark, and is an organization composed of individual members who are authorized to use the trademark under stated written conditions. I previously furnished counsel for PHONOMETRICS with copies

of various members' applications for membership provided to me by Mr. Roediger. There is no requirement in the members' applications or elsewhere that any particular type of kind of telephone system be used in members' hotels. I also informed PHONOMETRICS' counsel that BEST WESTERN INTERNATIONAL did not own hotels, did not buy or recommend the purchase of telephone systems by its members, and did not, itself, use a telephone system that provided instantaneous call accounting.

AFFIANT FURTHER SAYETH NAUGHT.

_____
Michael C. Cesarano

State of Florida)
) ss
County of Miami-Dade)

The foregoing Affidavit was subscribed and sworn to before me this 13th day of March, 2002, by Michael C. Cesarano who is personally known to me and who acknowledged this as his sworn statement.

_____
Notary Public for the State of Florida

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH
CASE NO. 94-6691-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC., a Florida corporation,

Plaintiff,

vs.

INTER-CONTINENTAL HOTELS CORP., et al.,

Defendants.
_____/

AFFIDAVIT OF PERSON MOST KNOWLEDGEABLE FOR DEFENDANT INTER-CONTINENTAL HOTELS CORP. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE. SUMMARY ADJUDICATION

I, GARY HAYNES, declare as follows:

1. I am a Senior Manager for Hotel Telecommunications at Six Continents Hotels, Inc. I reside in Roswell, Fulton County, Georgia, and am over the age of twenty-one. From 1989 until August 1998, I worked for Inter-Continental Hotel Corp ("IHC") a defendant in this action. Most of that time was spent working in the telecommunications aspect of IHC's business where I had the responsibility for overseeing the installation of PBX and telephone-related equipment and call accounting systems at IHC hotels.

2. I am making this Affidavit in support of Defendant IHC's Motion for Summary Judgment of Non-Infringement. If called upon to testify in this matter, I would testify based upon my personal knowledge as to the facts contained in this Affidavit.

3. I am familiar with the structure, operation, and maintenance of the telephone systems installed and used by IHC throughout the period between July 26, 1988 and October 30, 1990 (hereinafter the "Accused Systems") including, without limitation, those portions of the Accused Systems involved with accounting for the cost of calls placed using those systems.

4. None of the Accused Systems ever included a display of any type, either digital or otherwise, which was capable of displaying the costs of a call or any portion of a call, either in dollars and cents or in any other units, to any person, including, without limitation, the person placing that call, at any time while that call was in progress.

5. Nor did the Accused Systems ever include a display of any type, from which the person placing a call, or any other person, could see or otherwise perceive the cost of that call increasing in real time, either in dollars and cents or in any other units at any time while that call was in progress.

6. Nor did the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive the cost of that call or any portion of that call at any time while that call was in progress.

7. I am aware of no evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive information indicating the cost associated with that call or any portion of that call until some time after that call was no longer in progress.

FURTHER AFFIANT SAYETH NAUGHT

Executed this 12th day of March 2002.

STATE OF Texas

COUNTY OF Harris

Before me on this 12th day of March, 2002, Gary Haynes appeared as the (see above) of Inter-Continental Hotels Corp. on behalf of Inter-Continental Hotels Corp. who is personally known to me or produced GA D.L. # 064704305 as identification

_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH
CASE NO. 97-8125-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC., a Florida corporation,

Plaintiff,

Vs.

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.,

Defendants.
_____/

AFFIDAVIT OF WILLIAM E. DAVIS, ESQ. IN SUPPORT OF CENDANT CORPORATION'S (f/k/a HOSPITALITY FRANCHISE SYSTEMS, INC.) MOTION FOR SUMMARY JUDGMENT

STATE OF FLORIDA)
) ss
COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority authorized to take oaths in the State of Florida, personally appeared WILLIAM E. DAVIS, who, after being first duly sworn under oath, deposes and states as follows:

1. I am an attorney of law and partner with the law firm of Buchanan Ingersoll, P.C., attorneys of record for Defendant CENDANT CORPORATION f/k/a HOSPITALITY FRANCHISE SYSTEMS, INC. ("Cendant").

2. I have personal knowledge of the matters contained herein and, if called upon, could and would competently testify to the matters, as stated below.

3. Exhibit "1" attached hereto is a true and correct copy of Cendant's Answers to Plaintiff's First Set of Interrogatories.

4. Exhibit "2" attached hereto is a true and correct copy of Cendant's Answers to Plaintiff's Second Set of Interrogatories.

Executed this 12th day of March, 2002 in Miami, Florida.

_____

WILLIAM E. DAVIS

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the County and State aforesaid to take oaths and acknowledgments, personally appeared WILLIAM E. DAVIS, and attorney with the law firm of Buchanan Ingersoll, P.C., who took an oath and executed the foregoing Affidavit. He is personally known to me or showed me identification.

Dated this 12th day of March, 2002.

_____

NOTARY PUBLIC STATE OF FLORIDA
MIAMI-DADE COUNTY

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH
CASE NO. 97-8125-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC., a Florida corporation,

Plaintiff,

vs.

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.,

Defendants.
_____/

AFFIDAVIT OF PERSON MOST KNOWLEDGEABLE FOR DEFENDANT BENCHMARK HOSPITALITY, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE SUMMARY ADJUDICATION

I, Rodney Thiel, declare under penalty of perjury under the laws of the State of Texas, as follows:

1. I am Director of Information Technology for BENCHMARK HOSPITALITY, INC., ("BENCHMARK") a party in the above-entitled action, and reside at 2002 Mercoal Drive, Spring, Texas. I am over eighteen (18) years old and have worked in this capacity for three (3) years. My job responsibilities include overseeing and managing the telephone and telephone-related software and accounting systems for BENCHMARK.

2. I am making this Affidavit in support of Defendant's Motion for Summary Judgment of Non-Infringement.

If called upon to testify to this matter, I would testify based upon my personal knowledge as to the facts contained in this Affidavit.

3. As Director of Information Systems, I provide support to all Benchmark properties in the technology areas. This included operation reviews for all Benchmark properties, strategic planning of new opening and transition properties and implementation of systems such as corporate-wide area network and e-mail. I am also responsible for installation, support, and development of Benchmark property specific systems. I also serve as member of the Benchmark Technology Committee. I joined Benchmark in 1989 as pre-opening Director of Purchasing for The Northland Inn and Executive Conference Center in Minneapolis. Prior to joining Benchmark, he served as Purchasing Manager for the Amfac Hotel and then for the Marriott Hotel, both in Minneapolis.

4. On or about October 10, 2000, I performed an investigation of all call costs accounting systems in existence at any BENCHMARK property between February and October, 1990 using all documents and business records available at or to BENCHMARK.

5. I am particularly familiar with the structure, operation, and maintenance of the telephone systems installed and used by BENCHMARK throughout the period between November 22, 1988 and October 30, 1990 (hereinafter the "Accused Systems") including, without limitation, those portions of the Accused Systems involved with accounting for the cost of calls placed using those systems.

6. I have not found and am not aware of any evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, which was capable of displaying the costs of a call or any portion of a call, either in dollars and cents or in any other units, to any person, including, without limitation, the person placing that call, at any time while that call was in progress.

7. I have not found and am not aware of any evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, from which the person placing a call, or any other person, could see or otherwise perceive the cost of that call increasing in real time, either in dollars and cents or in any other units at any time while that call was in progress

8. I have not found and am not aware of any evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive the cost of that call or any portion of that call at any time while that call was in progress.

9. I have not found and am not aware of any evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive information indicating the cost associated with that call or any portion of that call until some time after that call was no longer in progress.

10. Attached hereto as Exhibit "1" are true and correct copies of Plaintiffs Responses to Interrogatories wherein it is admitted Plaintiff has no evidence of the use by BENCHMARK of any cost call accounting equipment that displays the total cost of the call to the hotel guest/caller, during the call and after the call has been made.

I declare under penalty of perjury, under the laws of the State of Texas, that the foregoing is true and correct.

Executed this 8th day of March, 2002 at 2170 Buckthorne Place, The Woodlands, Texas.

Rodney Thiel

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH

Case No. 97-8125-Civ-Ryskamp/Vitunac

PHONOMETRICS, INC.,

Plaintiff,

Vs.

HOSPITALITY FRANCHISE
SYSTEMS, INC., et al.,

Defendant.
_____/

AFFIDAVIT OF HOWARD SLAVITT IN SUPPORT OF DEFENDANT FAIRMONT HOTEL MANAGEMENT COMPANY'S AND GROSVENOR HOTEL GROUP'S MOTIONS FOR SAY JUDGMENTS OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

I, Howard A. Slavitt, being duly sworn upon oath, declare as follows:

1. I am an attorney and partner with the law firm of Coblentz, Patch, Duffy & Bass LLP, attorney of record for defendants Fairmont Hotel Management Company ("FAIRMONT") and Grosvenor Hotels Group ("GROSVENOR!") in this action.

2. I have personal knowledge of the matters contained herein and, if called upon, could and would competently testify to the matters as stated below.

3. Attached hereto as Exhibit 1 is a true and correct copy of FAIRMONT's Responses to Plaintiffs First Set of

Interrogatories in this matter, which responses were served on plaintiff on May 31, 2000.

4. Attached here to as Exhibit 2 is a true and correct copy of GROSVENOR's Responses to Plaintiffs First Set of Interrogatories in this matter, which responses were served on plaintiff on May 31, 2000.

5. I declare under penalty of perjury, under the laws of the United States of America and of the State of California, that the foregoing is true and correct.

FURTHER AFFIANT SAITH NOT.

Executed this 7th day of March 2002 at San Francisco, California.

_____
Howard A. Slavitt

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

On March 7, 2002, before me, the undersigned, a Notary Public in and for said State, personally appeared Howard A. Slavitt, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____

Signature of Notary Public

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH

Case No. 97-8125-Civ-Ryskamp/Vitunac

PHONOMETRICS, INC.,

Plaintiff,

vs.

HOSPITALITY FRANCHISE
SYSTEMS, INC., et al.,

Defendant.
_____/

AFFIDAVIT OF PERSON MOST KNOWLEDGEABLE FOR DEFENDANT FAIRMONT HOTEL MANAGEMENT COMPANY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

I, Charles C. Bond, being duly sworn upon oath, declare as follows:

1. From approximately 1995 through November 2001, I was the Executive Director of Accounting and Finance for Fairmont Hotel Management, L.P., of which defendant Fairmont Hotel Management Company ("FAIRMONT") was the managing partner. Before that, from approximately 1986 through 1995, I was employed by the Fairmont Hotel Co., Dallas L.P.) Fairmont Hotel Co., Chicago, L.P., and Fairmont Hotel Co., New Orleans, L.P. in the capacities of Controller and Assistant Controller. As the Executive National Director of Accounting, my job responsibilities included overseeing hotel operations, including the management of the telephone and telephone-related software and

accounting systems for FAIRMONT. In addition, while serving as the Controller and/or Assistant Controller for the Fairmont hotels located in Dallas, Chicago and New Orleans, I was involved in managing the telephone and telephone related software and accounting systems for each of those hotels.

2. I am making this Affidavit on behalf of defendant FAIRMONT in support of Defendant's Motion for Summary Judgment or, in the alternative, Summary Adjudication, as the person most knowledgeable on the subject of the telephone and telephone-related software and accounting systems at Fairmont hotels from February 26, 1990 through and including October 30, 1990. The following is based upon my personal knowledge and if called upon to testify to this matter, I would testify based upon my personal knowledge as to the facts contained in this Affidavit.

3. In 1983, I earned a Bachelor of Sciences degree in Accounting from Louisiana State University. I received my license as a certified public accountant in 1985 and became a certified hospitality account executive in 1986.

4. In or about May 2000, in connection with preparing responses to interrogatories propounded by plaintiff in this action, I performed and supervised an investigation of all call cost accounting systems in existence at any FAIRMONT property from February 26, 1990 through and including October 30, 1990, including using all documents and business records available at or to FAIRMONT.

5. I am particularly familiar with the structure, operation, and maintenance of the telephone systems installed and used by FAIRMONT throughout the period from February 26, 1990 through October 30, 1990 (hereinafter the "Accused Systems") including, without limitation, those portions of the Accused Systems involved with accounting for the cost of calls placed using those systems.

6. I have not found, nor am I aware of, any evidence

that any of the Accused Systems ever included a display of any type, either digital or otherwise, which was capable of displaying the costs of a call or any portion of a call, either in dollars and cents or in any other units, to any person, including, without limitation, the person placing that call, at any time while that call was in progress.

7. I have not found, nor am I aware of, any evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, from which the person placing a call, or any other person, could see or otherwise perceive the cost of that call increasing in real time, either in dollars and cents or in any other units at any time while that call was in progress.

8. I have not found, nor am I aware of, any evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive the cost of that call or any portion of that call at any time while that call was in progress.

9. I have not found, nor am I aware of, any evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive information indicating the cost associated with that call or any portion of that call until some time after that call was no longer in progress.

I declare under penalty of perjury, under the laws of the United States of America and of the State of California, that the foregoing is true and correct.

FURTHER AFFIANT SAITH NOT.

Executed this 8th day of March 2002 at Oakland, California.

_____

Charles C. Bond

STATE OF CALIFORNIA)
) ss.
COUNTY OF Alameda)

On March 8, 2002, before me, the undersigned, a Notary Public in and for said State, personally appeared Charles C. Bond, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____

Signature of Notary Public

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH

Case No. 97-8125-Civ-Ryskamp/Vitunac

PHONOMETRICS, INC.,

Plaintiff,

vs.

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.,

Defendant.
_____/

AFFIDAVIT OF PERSON MOST KNOWLEDGEABLE FOR DEFENDANT GROSVENOR HOTELS GROUP IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

I, Todd Werby, being duly sworn upon oath, declare as follows:

1. From approximately 1986 through the present, I have been the Executive Vice President of Grosvenor Properties Ltd. of which Defendant Grosvenor Hotels Group ("GROSVENOR") is a division. Before that, from approximately 1978 through 1986, I was employed by Grosvenor Properties Ltd. in various capacities including Financial Analyst, Assistant Vice President and Vice President. As the Executive Vice President of Grosvenor Properties Ltd., my job responsibilities include overseeing hotel management, including the purchase of capital

items such as the telephone and telephone-related software and accounting systems for GROSVENOR.

2. I am making this Affidavit on behalf of defendant GROSVENOR in support of Defendant's Motion for Summary Judgment or, in the alternative, Summary Adjudication, as the person most knowledgeable on the subject of the telephone and telephone-related software and I accounting systems at GROSVENOR from February 26,1990 through October 30,1990. The following is based upon my personal knowledge and if called upon to testify to this matter, I would testify based upon my personal knowledge as to the facts contained in this Affidavit.

3. In 1978 I earned a Bachelor of Arts degree in Economics from the University of California at Santa Cruz.

4. In or about May 2000, in connection with preparing responses to interrogatories propounded by plaintiff in this action, I performed and supervised an investigation of all call cost accounting systems in existence at any GROSVENOR property from February 26, 1990, through and including October 30, 1990, including using all documents and business records available at or to GROSVENOR.

5. I am particularly familiar with the structure, operation, and maintenance of the telephone systems installed and used by GROSVENOR throughout the period from February 26, 1990, through and including October 30, 1990 (hereinafter the "Accused Systems") including, without limitation, those portions of the Accused Systems involved with accounting for the cost of calls placed using those systems.

6. I have not found, nor am I aware of; any evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, which was capable of displaying the costs of a call or any portion of a call, either in dollars and cents or in any other units, to any person, including, without limitation, the person placing that call, at any time while that call was in progress.

7. I have not found, nor am I aware of, any evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, from which the person placing a call, or any other person, could see or otherwise perceive the cost of that call increasing in real time, either in dollars and cents or in any other units at any time while that call was in progress.

8. I have not found, nor am I aware of, any evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which coup have permitted any person, including, without limitation, the person placing a call, to perceive the cost of that call or any portion of that call at any time while that call was in progress.

9. I have not found, nor am I aware of, any evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive information indicating the cost associated with that call or any portion of that call until some time after that call was no longer in progress.

I declare under penalty of perjury, under the laws of the United States of America and of the State of California, that the foregoing is true and correct.

FURTHER AFFIANT SAITH NOT.

Executed this 7th day of March 2002 at San Francisco, California.

_____

Todd Werby

STATE OF CALIFORNIA)
) ss.

COUNTY OF SAN FRANCISCO)

On 3-7-02, before me, the undersigned, a Notary Public in and for said State, personally appeared Todd Werby, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____

Signature of Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
Case No.: 97-8125-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC.,

Plaintiff,

v.

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.,

Defendants.
_____/

AFFIDAVIT OF STANLEY YOUNG IN SUPPORT OF FOUR SEASONS HOTEL LIMITED'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE. SUMMARY ADJUDICATION

STATE OF CALIFORNIA)
COUNTY OF SAN MATEO) ss:

BEFORE ME, the undersigned authority, personally appeared Stanley Young, personally known by me, who being by me first duly sworn on oath, deposes and says:

I, Stanley Young, hereby declare as follows:

1. I am a shareholder with the law firm of Heller, Ehrman, White & McAuliffe LLP, attorneys of record for Four Seasons Hotels Limited in the above captioned matter. I am providing this declaration in support of Four Seasons Hotels

Limited's Motion for Summary Judgment or, in the Alternative, Summary Adjudication.

2. Attached hereto as Exhibit 1 is a true and correct copy of the signed Declaration of Geoffrey K. McDowell in of Defendant Four Seasons Hotels Limited in Support of its Motion for Summary Judgment or, in the Alternative, Summary Adjudication. Mr. McDowell is presently in Egypt and is therefore unable to provide a notarized affidavit in support of the facts attested to in his declaration. If desired by the Court, our office can submit an original, notarized affidavit attesting to the same facts upon Mr. McDowell's return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 12, 2002 in Palo Alto, California.

_____

Stanley Young

The foregoing instrument was acknowledged before me on this 12th day of March, 2002, by Stanley Young, who is personally known to me.

_____

Notary Public

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH
CASE NO. 97-8125-CIV RYSKAMP/VITUNAC

PHONOMETRICS, INC., a Florida corporation,

Plaintiff,

Vs.

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.,

Defendants.
_____/

DECLARATION OF GEOFFREY K. McDOWELL OF DEFENDANT FOUR SEASONS HOTEL LIMITED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

I, Geoffrey K. McDowell hereby declare as follows:

1. I am currently employed as Director, Information Technology New Hotel Projects for Four Seasons Hotels Limited (hereinafter "FSHL"), a defendant in this action. Unless otherwise noted, I have personal knowledge of the facts stated in this

declaration and could competently testify to the truth of these matters.

2. I was first employed by FSHL in 1981. At various points since 1982, my duties have included the purchase and installation of call accounting systems, the purchase and installation of property management systems, and the selection of all computer equipment for the United States properties managed by FSHL and/or its affiliates (collectively, "Four Seasons"), including call accounting systems. In about 1989 or 1990, when I assumed the role of Manager, 'technology & Research, my responsibilities expanded to include the selection of, with recommendations to hotels to purchase, all telephone switch equipment and computer equipment for properties managed by FSHL.

3. I have first hand knowledge of the call cost accounting systems used at the U.S. properties managed by Four Seasons. In the course of my employment with FSHL, I have visited many of the U.S. properties operated by Four Seasons in 1990, and have seen the call accounting systems which were in place at that time. In some instances, I personally selected the equipment to be installed in a property. In other cases, my knowledge is based on personal visits to the property, and/or review of documentation regarding the systems and discussions with Systems Managers of the individual properties. Regardless of the specific equipment used at a property, the mariner in which long distance calls were handled in a property in 1990 is generally the same as those calls are handled today.

4. I am particularly familiar with the structure, operation, and maintenance of the telephone systems installed and used by Four Seasons throughout the period between February 26, 1990, and October 30, 1990 (hereinafter the "Accused Systems") including, without limitation, those portions of the Accused Systems involved with accounting for the cost of calls placed using those systems.

5. I have found and am aware of no evidence that

any of the Accused Systems ever included a display of any type, either digital or otherwise, which was capable of displaying the costs of a call or any portion of a call, either in dollars and cents or in any other monetary units, to any person, including, without limitation, the person placing that call, at any time while that call was in progress.

6. I have found and am aware of no evidence that any of the Accused Systems ever included a display of any type, either digital or otherwise, from which the person placing a call, or any other person, could see or otherwise perceive the cost of that call increasing in real time, either in dollars and cents or in any other monetary units at anytime while that call was in progress.

7. I have found and am aware of no evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive the cost of that call or any portion of that call at any time while that call was in progress.

8. I have found and am aware of no evidence that any of the Accused Systems ever included any display, either digital or otherwise, or any other means which could have permitted any person, including, without limitation, the person placing a call, to perceive information indicating the cost associated with that call or any portion of that call until some time after that call was no longer in progress.

I declare under penalty of perjury that the forgoing is true and correct, and that this declaration was executed on this 12th day of March, 2002, at Sharm El Sheikh, Egypt.

_____

Geoffrey K. McDowell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

PHONOMETRICS, INC. Plaintiff, v. HOSPITALITY FRANCHISE SYSTEMS, INC., ET AL., Defendants.	)	Case No. 97-8125-CIV-RYSKAMP/VITUNAC AFFIDAVIT OF KRISTIN RING IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

I, Kristin Ring, hereby declare as follows:

1. I am an attorney at Coudert Brothers, LLP, attorneys for defendant RHI Hotels, Inc. ("RHI") in this matter. I have personal knowledge of the facts set forth in this affidavit and if called as a witness in this case could, and would, testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of RHI's Responses to Phonometrics Second Set of Interrogatories.

3. Phonometrics has not served any additional discovery requests on RHI since these interrogatories were propounded.

I DECLARE UNDER PENALTY OF PERJURY AND UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED THIS DAY OF MARCH, 2002 AT SAN FRANCISCO, CALIFORNIA.

Subscribed and sworn to me this
11TH day of March, 2002.

_____
Horace G. Austin

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION, WEST PALM BEACH
CASE NO. 97-8125-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC., a Florida corporation,

Plaintiff,

vs.

HOSPITALITY FRANCHISE SYSTEMS, INC., et al.,

Defendants.
_____/

AFFIDAVIT OF PATRICIA L. GREGOVITS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COUNTY OF ALLEGHENY

SS.

COMMONWEALTH OF PENNSYLVANIA

_____

Patricia L. Gregovits, being first duly sworn, deposes and says:

1. I am the Senior Manager - Telecommunications for Interstate Hotels, LLC, successor by merger to Interstate Hotels Corporation ("Interstate") a party in the above-entitled action. My job responsibilities include overseeing and managing the telephone and telephone-related software and accounting systems for Interstate.

2. I am making this Affidavit in support of Defendant's Motion for Summary Judgment based on my personal knowledge and on the knowledge and information I obtained as a result of an investigation that I undertook to prepare Defendant Interstate Hotels, LLC's Answers to Plaintiffs First Set of Interrogatories ("Interrogatory Responses"), a true and correct copy of which is attached as Exhibit A. If called as a witness, I could and would testify as set forth herein.

3. At the end of March 2000, I received a copy of Plaintiff's First Set of Interrogatories to Defendant Interstate Hotels Corporation. These interrogatories called for information about the telephone and call cost accounting systems in hotels that Interstate owned or managed during 1990. Because Interstate no longer owned or managed the great majority of those hotels, the information requested could only be obtained by review of records and by contacting others, including the vendor which supplied most of the telecommunications equipment for the Interstate hotels during 1990. As a result of my investigation, Interstate provided responses to Plaintiffs Interrogatories for thirty-nine (39) hotel properties owned or managed by Interstate during the relevant period of 1990 when Plaintiff alleges Interstate used telephone systems that infringed its patent (the "Accused Systems"). The information reported on Interstate's Interrogatory Responses was the best information responsive to the interrogatories that was reasonably available to Interstate as a result of my investigation.

4. As a result of my investigation and as the Interrogatory Responses show, no Interstate hotel for which information was available had any guest room telephone that displayed, or was capable of displaying, the cost of a telephone call to the guest as the call was in progress.

5. As a result of my investigation and as the Interrogatory Responses no Interstate hotel for which information was available had any Accused System which displayed the cost of a telephone call to any person, including a guest or a desk clerk, on a computer monitor, digital display or other means as the call was in progress.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Patricia L. Gregovits

COUNTY OF ALLEGHENY

SS.

COMMONWEALTH OF PENNSYLVANIA

On March 7, 2002, before me, Karen H. Patnychuk, Notary Public, personally appeared PATRICA L. GREGOVITS, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____

Notary Public